87-1581

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DR. PAUL KURTZ,

Petitioner,

v.

JAMES A. BAKER, SECRETARY OF THE TREASURY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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DATED: March 23, 1988

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a suit brought by a federal taxpayer which challenges his exclusion from the guest chaplain program administered by the Chaplain for the U.S. Senate and the Chaplain for the U.S. House of Representatives, on the grounds that his exclusion violates the freedom of speech and establishment clauses of the first amendment and the due process clause of the fifth amendment, presents a justiciable claim when the complaint names the chaplains and the Treasury Department officials responsible for funding the chaplaincies as defendants.

2. Whether the exclusion of a secular humanist from the guest chaplain program administered by the Chaplain for the U.S. Senate and the Chaplain for the U.S. House of Representatives violates the freedom of speech and establishment clauses of the first amendment and the due process clause of the fifth amendment.

PARTIES

The parties to the proceedings before the U.S. Court of Appeals for the District of Columbia Circuit were Dr. Paul Kurtz (petitioner herein), James A. Baker, Secretary of the Treasury, Katherine D. Ortega, Treasurer of the United States, Rev. James D. Ford, Chaplain for the U.S. House of Representatives, and Rev. Richard C. Halverson, Chaplain for the U.S. Senate (respondents herein).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Dr. Paul Kurtz, respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The September 18, 1987 opinion of the United States Court of Appeals for the District of Columbia Circuit is reproduced herein as Appendix A and is reported at 829 F.2d 1133. The March 11, 1986 and August 22, 1986 opinions of the United States District Court for the District of Columbia are reproduced herein as Appendices B and C respectively and are reported at 630 F. Supp. 850 and 644 F. Supp. 613.

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit entered its judgment on September 18, 1987 (App. D). The court of appeals denied rehearing and rehearing en banc on November 25, 1987 (App. E). In response to the petitioner's application, Chief Justice Rehnquist issued an order on February 12, 1988 extending the time for filing a petition for certiorari to and including March 24, 1988.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND CONGRESSIONAL RULES

Art. I, § 5, Cl. 2:

> Each House may determine the Rules of its proceedings * * *.

Art. I, § 6, Cl. 1:

> [F]or any Speech or Debate in either House, they [*i.e.*, the senators and representatives] shall not be questioned in any other Place.

Art. III, § 2, Cl. 1:

> The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution * * *.

Amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech * * *.

Amend. V:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

Senate Rule IV:

Commencement Of Daily Sessions

1. (a) The Presiding Officer having taken the chair, following the prayer by the Chaplain, and a quorum being present, the Journal of the preceding day shall be read * * *.

2. During a session of the Senate when that body is in continuous session, the Presiding Officer shall temporarily suspend the business of the Senate at noon each day for the purpose of having the customary daily prayer by the Chaplain.

House of Representatives Rule VII:

Duties Of The Chaplain

The Chaplain shall attend at the commencement of each day's sitting of the House and open the same with prayer.

STATEMENT OF THE CASE

Petitioner is challenging his exclusion from the guest chaplain program administered by the Chaplain of the United States Senate and the Chaplain of the United States House of Representatives.

The Senate and the House each appoint a chaplain whose duty it is to open the daily legislative session with appropriate remarks. However, although opening remarks at the daily sessions of the Senate and House are usually delivered by the Senate Chaplain and House Chaplain, both the Senate and House chaplaincies have a practice of inviting members of the public to deliver these opening remarks. In contrast with the chaplaincies themselves, which were instituted by the First Congress, the practice of allowing members of the public to have the honor of substituting for the official chaplain is of comparatively recent origin. Indeed, it was not until 1969 that the Senate gave any formal recognition to, and

established guidelines for, the practice (App. C. at 66a-67a). Nonetheless, the "guest chaplain" program is now firmly established and the chaplains acknowledge that one of their duties is to invite guests who will provide "wide representation to the many denominations in our country" (App. F).[1]

In early 1984, petitioner, a noted author and philosophy professor and a leader of the secular humanist movement in the United States, wrote the Senate Chaplain and House Chaplain and requested an opportunity to appear as a guest chaplain during one of the daily openings of the Senate and House. In his letters to the chaplains, Dr. Kurtz noted that he had no religious beliefs and would therefore not invoke a deity during his opening remarks. Dr. Kurtz pledged, however, that his opening remarks would in all other respects conform to the traditional standards for this ceremony. Dr. Kurtz also offered to share the podium with the chaplains during his opening if an invocation of a deity were thought essential.[2]

The chaplains declined to invite Dr. Kurtz on the ground that he would not pray during the opening. On the chaplains' interpretation of Senate and House rules,

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[1] Although the guest of the Senate Chaplain or the House Chaplain is himself referred to as a "chaplain," there is no requirement that the guest be a member of the clergy and there have been guests who were not clergymen. *See* Cong. Rec. S 5263 (daily ed. May 3, 1984) (opening remarks of Dr. Trueblood, a Quaker college professor). The title "guest chaplain" merely reflects the fact that the individual is serving as a substitute for the Senate or House Chaplain.

[2] Petitioner would be justified in thinking that invocation of a deity is not essential, as the Solicitor General of the United States has stated that "the predominant feature" of the formal openings of the House and Senate is their "secular" purpose. Brief for the United States as Amicus Curiae at 25 n.17, submitted in *Marsh v. Chambers*, 463 U.S. 783 (1983).

the opening remarks of guests must take the form of a prayer.[3]

On September 19, 1984, Dr. Kurtz filed a complaint in federal district court challenging his exclusion, and the Senate and House rules to the extent they supported his exclusion, as being unconstitutional. Specifically, petitioner alleged that his exclusion violated the establishment and free speech clauses of the first amendment and the equal protection component of the due process clause of the fifth amendment. As the chaplains are the officials who have the authority to invite (or refuse to invite) guests, Dr. Kurtz named them as defendants.[4] Because the chaplaincies are publicly-funded, 2 U.S.C. §§ 61a and 84-2, Dr. Kurtz also named the Secretary of the Treasury and the Treasurer of the United States as defendants. Petitioner invoked the jurisdiction of the district court pursuant to 28 U.S.C. § 1331.

Despite vigorous challenges to the justiciability of the complaint, the district court concluded in its March 11, 1986 decision (App. B), that petitioner had standing, that his complaint did not present a political question and that the Constitution's speech or debate clause did not bar adjudication of his claim. On the merits, the district court granted defendants' motions for summary judgment. The district court reasoned that this Court's decision in *Marsh v. Chambers*, 463 U.S. 783 (1983),

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[3] There are no Senate or House rules which specify what a guest must say during his opening. However, the chaplains applied the rules governing their remarks (Senate Rule IV, House Rule VII) to the remarks of their guests.

[4] The Senate Chaplain's answers to petitioner's interrogatories indicated that the Senate Chaplain has the authority to invite or decline to invite a guest, whether or not the guest has a senator as a sponsor. On the basis of the record before it, the district court did not hesitate to conclude that "the permission of the appropriate Chaplain is required for an individual to appear as a guest chaplain" (App. B at 54a).

could be interpreted to sanction the exclusion of non-theists, such as Dr. Kurtz, from the opening ceremonies, even though *Marsh* did not address the guest chaplaincy practice.[5]

Petitioner appealed this decision and on September 18, 1987, a panel of the United States Court of Appeals for the District of Columbia Circuit held, by a two-to-one vote, that petitioner lacked standing (App. A). The court of appeals accordingly remanded the case with directions to dismiss the complaint for lack of subject matter jurisdiction.

The divided panel reasoned that petitioner did not have standing to challenge the constitutionality of his exclusion because the named defendants did not "cause" his exclusion; rather, Senate and House rules "caused" his exclusion and the named defendants had no power to alter these rules (App. A at 18a-20a). The majority also concluded that petitioner did not have taxpayer standing under this Court's decision in *Flast v. Cohen*, 392 U.S. 83 (1968), because petitioner was, on the court's view, challenging internal practices of each house of Congress rather than a congressional enactment and no public funds have been expended on behalf of the guest chaplains themselves (App. A at 14a).

The dissent observed that the majority's understanding of the causation requirement for Article III standing was "extraordinary" (App. at 35a) and, if followed by

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[5] In addition to challenging his exclusion from the guest chaplain program, Dr. Kurtz's complaint had a second count which alleged that Rev. Halverson, the Senate Chaplain, routinely made statements during the opening ceremonies that disparaged the beliefs of non-theists. In a subsequent opinion (App. C), the district court dismissed this second count, without prejudice, after Rev. Halverson wrote Dr. Kurtz apologizing for some of his remarks and committing himself "to guard against" any future suggestion of disparagement. (App. C at 68a). Dr. Kurtz did not appeal the district court's dismissal of this second count.

other courts, had serious consequences for constitutional litigation:

> Were public officers not proper parties in a constitutional challenge to congressional measures—because such officers lack discretion to act in opposition to the legislature's objectives—then most actions of Congress would be immune from judicial review.

(App. A at 36a).

Petitioner's petition for rehearing and suggestion for rehearing en banc were denied on November 25, 1987 (App. E).

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' RULING ON STANDING IS IN CONFLICT WITH MULTIPLE DECISIONS OF THIS COURT AND, IF LEFT UNDISTURBED, WILL HAVE A SUBSTANTIAL IMPACT ON CONSTITUTIONAL LITIGATION

A. The Court Of Appeals Has Seriously Misinterpreted The Article III Requirement That There Be A Causal Link Between A Litigant's Injury And The Conduct He Challenges

The court of appeals' interpretation of the Article III requirements for standing cannot withstand analysis. A litigant has standing under Article III if he has suffered an identifiable injury which is both traceable to the action he challenges and capable of being redressed through the relief he seeks. *E.g., Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 72 (1978). The panel majority grudgingly conceded that appellant suffered an injury through his exclusion from the opening ceremonies of the House and Senate (App. A at 17a-18a). However, the panel majority, evidencing an insight not possessed by any of the respondents or by

the district court,[6] held that because the chaplains could not have invited Dr. Kurtz to participate in the opening without violating House and Senate rules, the chaplains did not "cause" his exclusion—even though these officers, through the exercise of their authority to invite (or decline to invite) guests, were the individuals who refused to allow Dr. Kurtz to participate in the opening.

The panel majority's novel theory of standing is inconsistent with literally dozens of decisions of this Court and of the other federal courts of appeals. A principle deeply embedded in our jurisprudence is that public officials are properly named as defendants if they are responsible for executing or implementing legislative or executive policy which is challenged in court even if they are not in a position to adopt or rescind such policy. *E.g., Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788 (1985) (in challenge to constitutionality of Executive Order, plaintiffs properly sue agency director responsible for its implementation); *Heckler v. Matthews*, 465 U.S. 728 (1984) (in constitutional challenge to Act of Congress, plaintiff properly sues Secretary charged with enforcement); *Brown v. Board of Education*, 347 U.S. 483 (1954) (school boards and school board officials properly named as defendants for implementing state statutes prohibiting black children from attending schools reserved for whites); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (in challenge to Executive Order, plaintiff properly sues cabinet officer who executed the Order).

This principle is so deeply embedded in our jurisprudence it is merely assumed without mention by the federal courts—even in cases in which justiciability issues are vigorously litigated. *E.g., Larson v. Valente*, 456 U.S. 228 (1982) (state commissioner and attorney gen-

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[6] Although the respondents contended that petitioner lacked standing, none of them advanced an argument similar to the panel's holding. The district court held that Dr. Kurtz had standing.

eral sued for implementing and enforcing state statute requiring registration of certain religious organizations); *Powell v. McCormack*, 395 U.S. 486 (1969) (House officers properly sued for implementing challenged House resolution).

According to the panel majority, all of these cases—and many others—were wrongly decided. Indeed, the judges and justices who decided these cases somehow overlooked elemental requirements of Article III standing.

The dissent correctly observed that the majority's decision works a revolution in constitutional jurisprudence, for if "public officers [were] not proper parties in a constitutional challenge to congressional measures—because such officers lack discretion to act in opposition to the legislature's directives—then most actions of Congress would be immune from judicial review." (App. A at 36a).

However, the dissent did not give sufficient credit to the breadth of the majority's opinion, since its principles are also applicable to state as well as federal officials. Thus, were the majority's opinion to be followed, numerous challenges to state statutes and regulations could no longer be heard in the federal courts, even though similar challenges had previously been brought in federal court without any question being raised regarding the plaintiffs' standing. Consider *Brown v. Board of Education, supra*. In *Brown*, this Court heard appeals from federal courts in three different states. (There was also an appeal from the Supreme Court of Delaware.) 347 U.S. at 486. Two of these jurisdictions, Virginia and South Carolina, expressly required public schools to be segregated and gave *no* authority to local school officials to deviate from this requirement. *Id.* at 486-87 n.1. The Virginia and South Carolina actions were brought against local school board officials—even though the local officials could not have admitted black children to the schools without violating the relevant state constitution and statutory code.

Davis v. County School Board, 103 F. Supp. 337 (E.D. Va. 1952); *Briggs v. Elliott*, 98 F. Supp. 529 (E.D.S.C. 1951). Under the panel majority's theory of standing, the black schoolchildren lacked standing to sue in federal court since the local school board had no discretion to grant their request to be admitted to the schools reserved for whites.[7]

Moreover, if the majority's opinion were allowed to stand, it would cast doubt on the constitutionality of that formidable body of precedent which holds that individual state officials may properly be sued in federal court in place of states or state agencies. *See, e.g., Ex Parte Young*, 209 U.S. 123 (1908).

Recognizing that their ruling was at least superficially inconsistent with prior decisions of this Court, the panel majority tried to reconcile their ruling with these cases, in particular this Court's decision in *Powell, supra.* In that case, this Court saw no bar to an action against House officers who denied Rep. Powell his salary and access to the House floor pursuant to a resolution which excluded Powell from the House: "That House employees are acting pursuant to express orders of the House does not bar judicial review of the constitutionality of the underlying legislative decision." 395 U.S. at 504.

The panel majority maintained that *Powell* is distinguishable because the House officers in *Powell* were acting within the scope of their authority, but "it is not within the chaplains' responsibilities to pass upon un-

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[7] Indeed, we know exactly what the panel majority would have written had they decided *Brown*:

> It is true that *if* the local school board had decided to ignore the limits of its authority, and *if* they decided to smuggle the black children into school, the children *might* have a chance to attain their goal before their purpose was discovered. But Article III requires a chain of causation less ephemeral than a coin tossed into a wishing well.

Cf. App. A at 21a.

orthodox requests to address either House of Congress" (App. A at 25a). According to the panel majority, Dr. Kurtz was not merely seeking to participate in the opening ceremonies, but wanted the same privilege "to address the Senate and the House" as is reserved for the "President of the United States and foreign heads of state and government" (App. A at 19a).

This attempted reconciliation is not only unavailing, but it underscores the dangers of the panel majority's theory of standing.

Petitioner asked to be invited as the chaplains' guest, in particular to substitute for them during the formal opening of each body (App. B at 40a-41a; App. C at 63a). The chaplains plainly have authority to "pass upon" such requests, as the district court found (App. B at 54a). Even if Dr. Kurtz's proposed opening does violate the rules governing the openings, this fact does not magically convert his request to participate in an opening into something else, nor does it deprive the chaplains of their authority to "pass upon" Dr. Kurtz's request. A federal law forbidding the military from employing Buddhists as chaplains would not deprive the responsible military officials of their authority to "pass upon" a Buddhist's "unorthodox" request to become a chaplain; it would merely result in his request being summarily denied, as was Kurtz's.[8]

In effect, the panel majority has attempted to transform the substantive issue of Article III standing into a semantic dispute by making standing dependent on the specificity of the language used to describe the litigant's

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[8] Moreover, it is not as clear as the panel majority assumes that petitioner's proposed opening would violate Senate and House rules. These rules do not expressly address the content of guests' remarks. In addition, as already noted, the opening ceremony has a predominantly secular character. *Supra*, p. 4 n.2. Dr. Kurtz's proposed opening is, therefore, in harmony with the essential features of the ceremony.

claim. If Dr. Kurtz's request is properly described as a request to participate in the opening ceremonies, then the chaplains caused his injury and he has standing; if Dr. Kurtz's request is indiscriminately described as a request "to address the Senate and the House" then the chaplains have no authority to "pass upon" his request and he has no standing to sue the chaplains for his exclusion.

On other occasions, this Court has resisted attempts to redefine a litigant's claim into oblivion. *See, e.g., Cornelius, supra*, 473 U.S. at 800-01.[9] Unless the important constitutional issue of Article III standing is to be allowed to degenerate into a linguistic, and result-oriented, analysis of a litigant's claim, the Court should take similar action in the instant case. The Court should review, and reverse, the court of appeals' extraordinary and erroneous view of the causation requirement for Article III standing.

B. The Court Of Appeals Has Misinterpreted The Requirements For Federal Taxpayer Standing

The chaplains receive compensation from public funds pursuant to statute. 2 U.S.C. §§ 61d and 84-2. One of the duties for which the chaplains receive compensation is arranging for guests to substitute for them during the

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[9] In *Cornelius*, a charity challenged its exclusion from the Combined Federal Campaign (CFC). This Court rejected the government's contention that the plaintiff's claim had to be interpreted as a request to be admitted to the federal workplace, rather than merely a request to have access to the CFC. The Court noted that in defining a "forum we have focused on the access sought by the speaker" and that "forum analysis is not completed merely by identifying the government property at issue." *Id.*

In the instant case, the government property at issue may be the House and Senate chambers, but Dr. Kurtz is only seeking access to the opening ceremonies, not the right to address the assembled legislators or to importune them at will on the House and Senate floor.

opening ceremonies (App. F). Dr. Kurtz, a federal taxpayer, has challenged the constitutionality of using public funds to compensate the chaplains as the chaplains only select religious individuals to be their guests. He predicates his challenge on the establishment clause of the first amendment. Accordingly, Dr. Kurtz has standing as a federal taxpayer under this Court's decision in *Flast v. Cohen*, 392 U.S. 83 (1968).

The panel majority thought otherwise. They first stated that *Flast* was inapplicable because Kurtz had not challenged a congressional enactment, but only internal rules of the Senate and House (App. A at 13a-14a). This mischaracterizes petitioner's complaint, which plainly indicates that petitioner has challenged the statutes which pay the chaplains for enforcing these discriminatory rules when they invite guests.

Secondly, the majority observed that the chaplains' guests, as distinguished from the chaplains themselves, receive no public funds (App. A at 14a). This observation is true, but irrelevant.

Public funding of parochial schools has been held to be unconstitutional whether or not the pupils attending the schools receive any direct benefit from the funding. *E.g., Lemon v. Kurtzman*, 403 U.S. 602 (1971) (statute providing for public compensation of parochial school teachers violative of first amendment). Just as a federal taxpayer would clearly have standing under *Flast* to challenge such funding (were the funds emanating from the federal treasury), so too a federal taxpayer, such as petitioner, should have standing under *Flast* to challenge the funding of the chaplains' activities, insofar as they relate to administration of the guest chaplain program, even though the guest chaplains receive no direct benefit from the funding.

A "simple hypothetical" is sometimes useful for bringing justiciability issues into sharper focus. *See Gold-*

water v. Carter, 444 U.S. 996, 999 (1979) (Powell, J., concurring). Assume that the federal government, to supplement the activities of military chaplains, decides to hire two individuals whose duty is to arrange for volunteer guest chaplains. These guests are asked to come to military bases to speak briefly to the soldiers and thereby to provide them with a variety of theological views to which they would not otherwise be exposed. Under the rules of the program, Christians, Jews, Moslems, Buddhists, etc. are invited, but not atheists. Even though only the administrators of the program are paid, petitioner submits that under *Flast* a federal taxpayer would have standing to challenge such payments, and accordingly he has standing to challenge the compensation of the House and Senate chaplains for exercising analogous duties.

As evidenced by the majority's opinion, the issue of federal taxpayer standing continues to present difficulties for the lower federal courts. This Court should resolve these difficulties by clarifying the extent to which its holding in *Flast* still has validity.

II. THIS COURT SHOULD RESOLVE THE FUNDAMENTAL QUESTIONS REGARDING THE PROPER INTERPRETATION OF THE FIRST AND FIFTH AMENDMENTS WHICH ARE PRESENTED BY PETITIONER'S CLAIM

This case presents important questions of constitutional law which should be resolved by this Court. In ruling on petitioner's claim, the Court will determine the extent to which the nonreligious must be accorded the same rights and respect as the religious. Moreover, the Court will also determine the extent to which limited public forums or nonpublic forums may deny access to speakers based on the content of a speaker's proposed remarks.

Petitioner maintains that the Senate Chaplain and the House Chaplain cannot allow members of the public

to have the honor of substituting for them if they refuse to extend this honor to certain members of the public because they do not believe in a deity. In support of his claim, he points to decisions of this Court which have held that the government may not give preference to one belief about God or gods over another. *Wallace v. Jaffree*, 472 U.S. 38, 52-3 (1985); *Larson v. Valente*, 456 U.S. 228, 246 (1982).

Moreover, petitioner's claim finds support in those decisions of this Court which have held that neither limited public forums nor nonpublic forums may deny access to speakers because of their viewpoint. *E.g., Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45, 49 (1983). The Senate and House chaplains have created a forum (of some sort) by deciding to share their tax-supported pulpits, their public property, with their fellow citizens. In doing so, they have "opened [their pulpits] for use by the public as a place for expressive activity." *Id.* at 45. The chaplains were not required to create such a vehicle for expressive activity, but "having done so, [they have] assumed an obligation to justify [any] discrimination and exclusions under applicable constitutional norms." *Widmar v. Vincent*, 454 U.S. 263, 267 (1981). They cannot, as government officials, "enforce certain exclusions from [their forum], even if [they were] not required to create the forum in the first place." *Id.* at 267-68.

Despite the precedent supporting Dr. Kurtz's claim, the district court ruled against him, relying on this Court's decision in *Marsh v. Chambers*, 463 U.S. 783 (1983) (App. B at 55a-56a). The district court misread both *Marsh* and petitioner's complaint.

In *Marsh*, this Court upheld the constitutionality of legislative chaplains. Dr. Kurtz is not challenging the constitutionality of the House and Senate chaplaincies; he is not challenging the saying of prayers by the chaplains during the opening ceremonies; he is not even chal-

lenging the saying of prayers by the chaplains' guests. Instead, his claim is simply that if the chaplains are to allow members of the public to participate in the opening ceremonies, they cannot exclude those who do not believe in a deity and, therefore, cannot pray during their openings. There is not one word in *Marsh* that suggests this Court would uphold the constitutionality of a guest chaplain program that excludes the nonreligious. Accordingly, petitioner's claim in the instant case is not in any way inconsistent with *Marsh*.[10]

Although not expressly addressing the merits of petitioner's claim, the court of appeals seemed to suggest that Dr. Kurtz's claim could not possibly have merit because he is seeking to give secular remarks in a forum reserved for prayer: "[Kurtz] clings to beliefs that are incompatible with what he desires" (App. A at 18a).

However, as previously noted, the Solicitor General of the United States has stated that "the predominant feature" of the formal openings of the House and Senate is their "secular" purpose. Brief for the United States as Amicus Curiae at 25 n.17, submitted in *Marsh v. Chambers*, *supra*. In fact, in justifying the constitutionality of compensating the chaplains with public funds, the Solicitor General asserted "that the chaplain's pay is for the performance of a predominately secular function." *Id.* at 31. The function of the opening ceremony is to "prompt[] legislators to reflect on the gravity and solemnity of their responsibilities and of the acts they are about to perform." *Id.* at 23 (quoting *Colo v. Treasurer*, 392 N.E.2d 1195, 1200 (Mass. 1979)).

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[10] Furthermore, the rationale for the Court's holding in *Marsh* does not permit the Court's ruling to be extended to the chaplains' guest program. In deciding *Marsh*, this Court relied almost exclusively on the "unique history" of legislative chaplains, emphasizing that the First Congress had appointed two official chaplains. *Id.* at 790-91. The guest program does not share this sanction of the Founding Fathers with the chaplaincies themselves, given the guest program's relatively recent inception.

Thus, according to the Solicitor General of the United States, an opening by Dr. Kurtz could fulfill the "predominant" purpose of the ceremony as well as an opening by someone less skeptical in matters of religion.[11]

Perhaps more fundamentally, the court of appeals' suggestion begs the question of whether the opening remarks of the chaplains' guests (as contrasted with the opening remarks of the chaplains themselves) can constitutionally be restricted to remarks which take the form of a prayer.

The chaplains themselves are not supposed to serve as representatives of the various religious beliefs that people have in this country. Their presence within the House and Senate merely reflect a tradition that began with the First Congress. Their role is historically, rather than logically, justified. *Cf. Marsh*, 463 U.S. at 790-91.

The chaplains' guests, on the other hand, *are* supposed to represent the various beliefs that this nation's citizens have about matters religious. The stated purpose of the guest chaplain program is to give "wide representation" to these different beliefs, and thereby to emphasize that the government treats these beliefs with equal respect (App. F).

By excluding petitioner from the opening ceremonies, the chaplains are declaring that agnostics and atheists are not entitled to the same respect given to the religious. The chaplains' unmistakable message is that skeptics such as Dr. Kurtz are not worthy to participate in the solemn opening of the House or Senate. Exclusion of the nonreligious from the chaplains' guest list constitutes a symbolic declaration of the government's disapproval of the nonreligious, and this symbolism has constitutional significance. *Larkin v. Grendel's Den*, 459 U.S. 116, 125-26 (1982) (statute invalidated in part because it

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[11] This point also bears on the panel majority's erroneous standing ruling, as previously noted. *Supra*, p. 11, n.8.

"provides a significant symbolic benefit to religion in the minds of some").

The opening ceremonies of our nation's legislature, if they claim to represent anybody, must represent everybody, the religious and nonreligious alike. It would be better to eliminate the guest chaplain program entirely, than to allow it to carry on in a discriminatory fashion. "No one believes any more that since the captain of a warship has no duty to let members of the general public on board to visit the ship . . . he can decide to allow only Protestant visitors on board." *Philly's v. Byrne*, 732 F.2d 87, 90 (7th Cir. 1984).[12]

Dr. Kurtz proposed to state, as part of his opening remarks, that "America is large and bountiful enough to accommodate both the believer and the nonbeliever and the theist and the secularist who, in sharing the fruits of a free society, are willing to work cooperatively to defend it." His claim in this case, in essence, is that the Constitution compels the Senate and House chaplains to put that statement into practice when they invite members of the public to participate in the solemn openings of the Senate and House. Whether the chaplains have this obligation is clearly a question which warrants resolution by this Court.

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[12] There is nothing paradoxical about Dr. Kurtz's contention that the chaplains must also invite the nonreligious or invite nobody. Kurtz is complaining that he has been denied equal treatment and "the appropriate remedy is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler v. Matthews*, 465 U.S. 728, 740 (1984) (emphasis in original).

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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DATED: March 23, 1988

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5660

PAUL KURTZ, DR.,

Appellant

v.

JAMES A. BAKER, Secretary of the Treasury, *et al.*

Appeal from the United States District Court
for the District of Columbia

(D. C. Civil No. 84-2919)

Argued May 12, 1987

Decided September 18, 1987

Ronald A. Lindsay for appellant.

Steven R. Ross for appellee House Chaplain Ford.

Michael Davidson for appellee Senate Chaplain Halverson. *Ken U. Benjamin, Jr.* and *Morgan J. Frankel* also entered appearances for appellee Halverson.

Richard K. Willard, Assistant Attorney General, *Joseph E. diGenova*, United States Attorney, *Michael Jay Singer*, and *Jay S. Bybee*, Attorneys, U.S. Department of Justice, were on the brief for appellees Secretary of the Treasury, et al.

Before RUTH B. GINSBURG, BUCKLEY, and D. H. GINSBURG, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* BUCKLEY.

Opinion filed by *Circuit Judge* RUTH B. GINSBURG, dissenting from the court's standing disposition.

BUCKLEY, *Circuit Judge*: Dr. Paul Kurtz is a professor of philosophy and an advocate of "secular humanism." He challenges the refusal of chaplains of the United States Senate and House of Representatives to invite non-believers to deliver secular remarks in both houses of Congress during the period each house reserves for morning prayer. He advances claims under the establishment and free speech clauses of the First Amendment, and under the equal protection principles of the due process clause of the Fifth Amendment. Because appellant lacks standing under Article III of the Constitution, the judgment of the district court is vacated and the case is remanded with directions to dismiss the complaint for lack of subject matter jurisdiction.

I. BACKGROUND

The United States Senate and the United States House of Representatives have each appointed an official chaplain whose duties include the opening of daily sessions with prayer. The official chaplains of the Senate and the House occasionally invite guest chaplains of various denominations, some not ordained, to deliver the opening prayer. Dr. Kurtz asserts that these guest chaplains must be considered "guest speakers" because restricting their function to prayer would violate the Constitution. He would like to be invited as a "guest speaker" to deliver a moral but "non-theistic" invocation in the Senate and the House during what he styles their "opening ceremonies." Because denial of standing should rest on a careful assessment of all relevant circumstances, it is necessary to set out the facts in some detail.

A. *Appellants's Request to the Chaplains*

Appellant wrote to the Reverend Richard C. Halverson, Chaplain of the Senate, and the Reverend James D. Ford, Chaplain of the House, requesting permission to address their respective houses "[o]n behalf of the Council for Democratic and Secular Humanism." Letter from Dr. Kurtz to Rev. Halverson (Feb. 13, 1984), Joint Appendix ("J.A.") at 29-30; Letter from Dr. Kurtz to Rev. Ford (Feb. 13, 1984), J.A. at 71-72. In each letter Kurtz "request[ed] the opportunity to appear as a guest speaker and to open a daily session . . . with a short statement in which [he] would remind the [members of the Senate and the House] of their moral responsibilities." Letter to Rev. Halverson, J.A. at 29; Letter to Rev. Ford, J.A. at 71. He advised both chaplains that he would not utter a prayer if invited:

> As a secular humanist, I would not, of course, invoke any deity during my remarks. However, my remarks would otherwise fall within the traditional format. If for some reason you believe it is necessary to open the session with the invocation of a deity, I would have no objection to sharing the podium with you. I do believe that it is important, however, for the [members of the Senate and the House] occasionally to have the opportunity to hear non-theists speak of moral responsibilities since one of the common prejudices in our country is that non-theists do not recognize any moral responsibilities.

Letter to Rev. Halverson, J.A. at 29; Letter to Rev. Ford, J.A. at 71.

B. *The Chaplains' Responses*

On February 27, 1984, Halverson responded with thanks and the following statement: "In the three years I have been the Chaplain my policy has been to invite those who are sponsored by a Senator." Letter from Rev.

Halverson to Dr. Kurtz (Feb. 27, 1984), J.A. at 31. Kurtz, a citizen of the State of New York, then wrote to Senators Moynihan, D'Amato, Goldwater, Hatfield, and Weicker requesting sponsorship, but none agreed. J.A. at 32-33 (first letter to Sen. Moynihan), 35-36 (to Sen. Weicker), 37-38 (second leter to Sen Moynihan), 39 (to Sen. D'Amato), 40 (to Sen. Goldwater), 41 (to Sen. Hatfield). Only the chief legislative assistant to Senator Hatfield responded in writing, essentially as follows:

> There is no provision or desire for lectures from whatever source. I can appreciate the convictions which you expressed in your "proposed opening." However, the intent of the time of prayer is to acknowledge our dependence upon the transcendent Creator.
>
> . . . [Moreover Senator Hatfield would not] use one of his rare opportunities to present a guest pastor for someone who [sic] he does not know and who cannot out of conviction abide by the spirit of the rules of the Senate.

Letter from Thomas R. Getman, Chief Legislative Assistant to Sen. Mark O. Hatfield, to Dr. Kurtz (June 5, 1984), J.A. at 42.

After failing to attract a sponsor, Kurtz again wrote to Halverson, renewing his earlier request and stating he was not aware of the existence of a Senate rule supporting Halverson's sponsorship requirement. Letter from Dr. Kurtz to Rev. Halverson (Aug. 30, 1984), J.A. at 43. Halverson responded on September 7 by restating his earlier position, explaining that only the Senate can make an exception to the rule that only Senators may address the Senate, and that the Senate Chaplain was allowed "to invite two guests per month to open the Senate with prayer. Obviously this does not include inviting someone to speak, however briefly." Letter from Rev. Halverson to Dr. Kurtz (Sept. 7, 1984), J.A. at 44.

Ford responded to appellant's first letter by stating that "[t]he rules of the United States House of Representatives provide that each session will open with a prayer by the Chaplain. It is therefore impossible, pursuant to the rules of the House, for me to invite you be [sic] a guest speaker." Letter from Rev. Ford to Dr. Kurtz (Mar. 26, 1984), J.A. at 73. Kurtz then sent Ford a second letter suggesting he would speak after Ford said a prayer. Letter from Dr. Kurtz to Rev. Ford (Apr. 6, 1984), J.A. at 74-75. Ford replied that "[t]he chaplain cannot yield to another person for a statement." Letter from Rev. Ford to Dr. Kurtz (Apr. 25, 1984), J.A. at 76. Kurtz then predictably suggested that he speak before Ford or, perhaps less predictably, that they "deliver a truly joint opening by alternating the lines of our texts." Letter from Dr. Kurtz to Rev. Ford (May 23, 1984), J.A. at 77.

C. *The Complaint*

On September 19, 1984, appellant Kurtz filed a complaint styled an "action challenging the constitutionality of certain practices of the Chaplain of the U.S. House of Representatives . . . and the Chaplain of the U.S. Senate." Complaint at 1, J.A. at 8. Kurtz names as defendants the Secretary of the Treasury and the Treasurer of the United States ("Treasury appellees"), and the Reverends Ford and Halverson. The complaint alleges two counts. Count one in part makes the following allegations concerning the chaplains:

> 38. The exclusion of non-theists, such as Plaintiff, from the guest speakers program on the basis of the content of their remarks violates the Free Speech, Free Exercise and Establishment Clauses of the Fifth Amendment to the Constitution.
>
> 39. To the extent that Senate and House rules require guest speakers to utter a prayer, those rules violate the Free Speech, Free Exercise and Estab-

> lishment Clauses of the First Amendment and the Due Process Clause of the Fifth Amendment to the Constitution.
>
> 40. To the extent that any policy of the Senate or the Senate Chaplain to invite only those speakers sponsored by a Senator results in discrimination against speakers from unpopular minority groups, such as Plaintiff, that policy violates the Free Speech, Free Exercise and Establishment Clauses of the First Amendment and the Due Process Clause of the Fifth Amendment to the Constitution.

Complaint at 10, J.A. at 17.

In regard to the Treasury appellees, count one makes only one specific assertion, namely that they "are responsible for disbursing federal funds that support the chaplaincies." Complaint at 8, J.A. at 15. Count two of the complaint alleges that Halverson routinely uses opening prayers in the Senate to disparage "the beliefs of non-theists." Complaint at 11, J.A. at 18. Count two, however, is not before us.

Kurtz requests declaratory and injunctive relief with respect to count one. He seeks declarations that (1) the exclusion of "non-theists" from the "guest speaker program" in the Senate and the House, (2) any Senate or House rule requiring "guest speakers to utter a prayer," and (3) any policy to invite only sponsored speakers to the Senate which results in discrimination against "non-theists," violate the free speech and religion clauses of the First Amendment and the due process clause of the Fifth Amendment. *Id.* at 19. He also requests permanent injunctions barring the exclusion of "non-theists" from the "guest speaker programs[s]" of the House and the Senate, or alternatively barring the disbursement of funds from the United States Treasury for the House and Senate chaplaincies.

D. *Disposition in the District Court*

The defendants moved for summary judgment on all counts. The district court granted that motion as to count one, reserving its disposition of count two for a later date. *Kurtz v. Baker*, 630 F. Supp. 850, 859, 861 (D.D.C. 1986). The court first considered defendants' three-pronged challenge to its jurisdiction over the subject of the complaint; namely, that (1) Kurtz lacked standing, (2) his challenge presented nonjusticiable political questions, and (3) his action was barred by defendants' immunity derived from the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1. It rejected all three arguments, affirmed Kurtz' standing, and proceeded to decide the merits. *Id.* at 854-55.

The court determined that Kurtz' injury was sufficiently concrete, directly traceable to the challenged conduct, and redressable. It also interpreted Kurtz' challenge as one to the chaplains' interpretation of Senate and House rules, but not to the rules themselves, thus distinguishing cases that applied the increasingly weak political question doctrine. Finally, it found that opening prayers did not so intimately partake of the legislative process as to fall within the protection of the Speech or Debate Clause. *Id.* The court concluded that the free speech and equal protection claims in count one lacked merit, relying primarily on *Marsh v. Chambers*, 463 U.S. 783 (1983) (Nebraska legislature's chaplaincy practice does not violate the establishment clause). *Kurtz*, 630 F. Supp. at 855-58.

E. *Arguments on Appeal*

Kurtz calls this case a "textbook illustration" of proper standing. Brief for Appellant at 34. Appellees disagree. House counsel contend that Kurtz lacks standing in part because his request was not personal, but rather a request on behalf of the Council for Democratic and Secular Humanism. Brief for Appellee Ford at 22-23 (quoting

Letter from Dr. Kurtz to Rev. Ford, J.A. at 71). Senate counsel asserts that there is no "guest speaker program" in the Senate except one very closely controlled by the Senate leadership. *See* Brief for Appellee Halverson at 8. Senate counsel further contends that "[t]he lack of judicial power to compel either House of the coordinate legislative branch to alter its constitutionality valid rules requires affirmance of the grant of summary judgment." *Id.* at 16-17.

The Treasury appellees invoke Article III against appellant by relying on the requirement that the injury alleged be legally cognizable. They then invoke the political question doctrine to define Kurtz' alleged injury as non-cognizable for purposes of Article III. Brief for Appellees Baker and Ortega at 16-19. In their political question discussion, counsel for the Treasury appellees argue that Kurtz' complaint is a challenge to House and Senate rules, notwithstanding the district court's contrary conclusion, and that the Constitution textually commits to each house the exclusive power to adopt the challenged rules. Although they concede that in *United States v. Ballin*, 144 U.S. 1 (1892), the Supreme Court reviewed the constitutionality of a House Rule, they assert that the Court did so only to the extent necessary to establish whether the Rule "ignore[d] constitutional restraints or violate[d] fundamental rights." Brief for Appellees Baker and Ortega at 20-21 (quoting *Ballin*, 144 U.S. at 5). They can rely on *Marsh v. Chambers* to show that the rules meet the constitutional tests. As we conclude appellant is without Article III standing for the reasons set forth below, we do not reach the political question issue.

II. Discussion

In Anglo-American law the traditional case has pitted a personally aggrieved plaintiff against a defendant who has wronged him. The judicial task has been to determine whether the defendant caused the plaintiff a readily

identifiable injury, and if so, whether to order the defendant to stop or make whole the wrong. Like so many others the Supreme Court has recently examined for standing, this litigation presents a claim that is nontraditional. *See Diamond v. Charles*, —— U.S. ——, 106 S. Ct. 1697 (1986) (physician lacks standing to defend State abortion law); *Allen v. Wright*, 468 U.S. 737 (1984) (parents of black children representing nationwide class lack standing to challenge IRS policies for awarding tax-exempt charitable status to racially discriminatory private academies); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982) (individuals and organization desiring strict separation between Church and State lack standing to challenge conveyance of federal property to sectarian school); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) (individuals and organization lack standing to challenge relaxation in indigent-care requirements applicable to hospitals desiring tax-exempt charitable status); *Warth v. Seldin*, 422 U.S. 490 (1975) (organizations and individuals representing a class lack standing to challenge racially discriminatory housing ordinance); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (organization and individuals lack standing to challenge membership of members of Congress in armed forces Reserves).

Deciding whether an action lies within the judicial power of the United States requires the careful application of precedents construing Article III's case-or-controversy requirement. Such investigation can become a barren and abstract exercise unless the basic thrust of the Supreme Court's decisions is kept in mind. That underlying pattern has been summarized as follows:

> There is no case or controversy, the reasoning has gone, when there are no adverse parties with personal interest in the matter. Surely not a linguisti-

> cally inevitable conclusion, but nonetheless an accurate description of the sort of business courts had traditionally entertained, and hence of the distinctive business to which they were presumably to be limited under the Constitution.

A. Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881, 882 (1983) (footnote omitted).

As explained below, appellant alleges injury to various social but only one cognizable, personal interest. Injury to his social interest in having the views of secular humanists sympathetically presented in Congress cannot satisfy Article III. Injury to the one personal interest he does assert could not have been caused by appellees because, first, he has not alleged that they had the power to inflict it and, second, an allegation that they had such power would not have been tenable if made. To believe that the two chaplains could have authorized appellant to address a non-religious statement to the United States Senate and House of Representatives during periods explicitly reserved for prayer requires a suspension of ordinary common sense that this court need not indulge.

Thus the complaint barely survives scrutiny under the first part, and thoroughly fails under the second part, of the test the Supreme Court has developed for determining Article III standing: (1) there must be concrete personal injury to the plaintiff, (2) such injury must be fairly traceable to the challenged conduct, and (3) the injury must be "likely" to be redressed if the relief sought is granted. *See Diamond*, 106 S. Ct. at 1707-08; *Allen*, 468 U.S. at 751-52; *Valley Forge*, 454 U.S. at 472; *see also Eastern Ky. Welfare Rights Org.*, 426 U.S. at 41-42; *Warth*, 422 U.S. at 498-99. Because the second part of the test is not satisfied, it is unnecessary to estimate whether an order from this court compelling the chaplains to invite appellant to address Congress or to broaden the

category of "guest speakers" to include non-believers would be "likely" to result in Kurtz being heard.

A. *Article III Injury*

The court must police its jurisdiction by applying its own careful analysis of the complaint, guided by precedent. *See Bender v. Williamsport Area School Dist.*, —— U.S. ——, 106 S. Ct. 1326, 1331 (1986). In this regard, Justice Powell reminds us that where a party's standing is challenged in a motion to dismiss, a reviewing court "must construe the complaint in favor of the complaining party." *Warth*, 422 U.S. at 501.

The first requirement for standing is that the plaintiff "allege a distinct and palpable injury to himself." Reasonably construed in favor of appellant, the complaint alleges three types of injury. First, the complaint alleges that "Dr. Kurtz is also a federal taxpayer." Complaint at 3, ¶ 5, J.A. at 10. This suggests a claim of injury in the misuse of his taxes to support unconstitutional chaplaincy practices. Second, by alleging that "the exclusion of non-theists is divisive and confers an important symbolic benefit upon religion," the complaint could be said to allege stigmatic injury to atheistic beliefs in violation of the Constitution. Complaint at 10, ¶ 37, J.A. at 17. Third, the complaint presents two versions of an "exclusion injury": the first is based on the claim he was "denied the opportunity to appear as a guest speaker [because] he is a non-theist and would not invoke a deity in his remarks," Complaint at 9, ¶ 35, J.A. at 16, and the other, "[t]he exclusion of non-theists, such as Plaintiff, from the guest speaker program . . . ." Complaint at 10, ¶ 38, J.A. at 17.

These allegations of injury cannot be accepted on their face without examination. The petitioners in *Allen v. Wright*, for example, alleged that Internal Revenue Service regulations and practices encouraged white students to attend racially segregated private academies receiving

IRS tax-deductible charity status, thus resulting in a more racially segregated public education for petitioners' black children. The Court first examined petitioners' various allegations of injury, and determined that only one, the black "children's diminished ability to receive an education in a racially integrated school," *Allen*, 468 U.S. at 756, was judicially cognizable. Similarly, here it is necessary to examine each of appellant's alleged injuries for compliance with the requirement that they be personal and concrete. *Cf. Von Aulock v. Smith*, 720 F.2d 176, 185 (D.C. Cir. 1983) (court denied standing on the basis of a "reasonably extensive inquiry into the underlying merits of the lawsuit").

We conclude that the first claim of injury does not satisfy Article III's injury requirement. The second allegation, interpreted as an assertion of stigmatic injury to secular humanists, also falls short of what Article III requires. In the third category, only one of the two claims of "exclusion injury" satifies the Article III requirement.

Each of these conclusions deserves careful explanation, especially in view of appellant's assertion that this lawsuit is a "textbook example" of proper standing.

1. Taxpayer Standing

The complaint may fairly be construed to allege "taxpayer standing," but such an allegation cannot satisfy Article III in this case. In *Valley Forge* the Court denied standing to an association dedicated to the separation of Church and State and four of its employees who brought an action against the United States Department of Health, Education and Welfare, and a seminary of the Assemblies of God. They challenged the department's approval of the conveyance of United States property to the seminary, and premised their standing on the "'depriv[ation] of the fair and constitutional use of [their] tax dollar.'" 454 U.S. at 476 (brackets original) (quoting complaint).

The Court rejected this taxpayer standing theory by distinguishing the case from *Flast v. Cohen*, 392 U.S. 83 (1968). *Flast* is the only Supreme Court decision holding that a taxpayer has standing to complain about alleged government misuse of tax revenues in violation of the establishment and free exercise clauses of the First Amendment. The Court interpreted *Flast* to apply narrowly "to challenges directed 'only [at] exercises of congressional power,'" *Valley Forge*, 454 U.S. at 479 (brackets original) (quoting *Flast*, 392 U.S. at 102), and still more narrowly to "an exercise of authority conferred by the Taxing and Spending Clause of Art. I, § 8." 454 U.S. at 480.

The *Valley Forge* Court relied on *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), to buttress a narrow reading of *Flast*. *Valley Forge*, 464 U.S. at 481. In *Schlesinger* plaintiffs brought an action challenging the military reserve commissions of several members of Congress as contrary to the incompatibility clause of Article I. *See* U.S. Const. art. I, § 6, cl. 2 ("no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office"). The Court rejected the plaintiff's "taxpayer standing" theory because they "did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status." *Schlesinger*, 418 U.S. at 228; *see also United States v. Richardson*, 418 U.S. 166, 175 (1974) (taxpayer standing denied because challenge was "not addressed to taxing and spending power, but to the statutes regulating the CIA").

In this case Kurtz challenges no "exercise of congressional power" or "congressional enactment" but internal practices of *each* house of Congress. *See* U.S. Const. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . . ."). Because the power rests only with each house, there exists no enactment by Congress, which

would require *inter alia* passage in both houses and presentment to the President. *See* U.S. Const. art. I, § 7, cl. 2. Therefore appellant cannot satisfy *Flast*'s first requirement for taxpayer standing, namely that the challenge be directed "at exercises of *congressional* power." Furthermore, as there is no allegation that guest chaplains receive a stipend from the federal government, we cannot see how the practice of inviting guest chaplains to offer the opening prayer is an exercise of Congress' taxing and spending power. Thus the suit also fails *Flast*'s second requirement for taxpayer standing.

Even if appellant were able to meet both requirements, he would still fail to establish justiciability. The Supreme Court has recently explai d that a taxpayer's ability to meet the *Flast* test does not bestow automatic standing. More is required.

> Although not necessary to our decision, we note that any connection between the challenged property transfer and respondents' tax burden is at best speculative and at worst nonexistent. . . . Even if respondents had brought their claim within the outer limits of *Flast*, therefore, they still would have encountered serious difficulty in establishing that they "personally would benefit in a tangible way from the court's intervention." *Warth v. Seldin*, 422 U.S., at 508.

Valley Forge, 454 U.S. at 480-81 n.17. The Supreme Court thus confirms that *Flast* did not address the causation and redressability questions decided in *Warth*, *Eastern Kentucky Welfare Rights Org.*, and *Allen*. In sum, *Flast* does not apply here because: (1) this lawsuit is not a challenge to congressional action taken pursuant to the taxing and spending power; and (2) as shown below, appellant lacks standing under Article III causation principles.

As *Flast* does not apply, the court must follow the general rule against taxpayer standing in *Frothingham*

v. Mellon, 262 U.S. 447 (1923) (decided with *Massachusetts v. Mellon*). *Valley Forge*, 454 U.S. at 476-77 (a discussion of taxpayer standing "must begin with *Frothingham v. Mellon* . . ."). In *Frothingham* a federal taxpayer challenged the constitutionality of a federal statutory scheme granting federal funds to the Commonwealth of Massachusetts for the purpose of improving maternal and infant health. The Court held that any effect on the plaintiff's tax burden was "remote, fluctuating and uncertain," *Frothingham*, 262 U.S. at 487, so that her alleged injury could have been nothing more than her disagreement with allegedly unconstitutional official conduct. *Id.* at 488. The same conclusion obtains here with respect to appellant Kurtz' tax burden. He cannot plausibly contend that anything appellees have done has had an impact on his contributions to the United States Treasury, so that in asserting taxpayer standing he is alleging nothing more than disagreement with the actions he challenges.

As the complaint refers to the Treasury appellees only to establish a link, for purposes of alleging taxpayer standing, between federal expenditures and the House and Senate chaplaincies, the absence of taxpayer standing means that only appellant's standing to challenge the chaplains' conduct needs further examination.

2. Stigmatic Injury to Atheism

The second possible basis for appellant's claim of injury is that the exclusion of non-believers like Kurtz stigmatizes secular humanists in violation of the Constitution. The Supreme Court rejected such allegations of injury in *Allen v. Wright*, and we must do the same here. In *Allen* this court had upheld the black parents' standing on the theory that "[t]he sole injury [respondents] claim is the denigration they suffer as black parents and school children when their government graces with tax-exempt status educational institutions in their com-

munities that treat members of their race as persons of lesser worth." 468 U.S. at 749 (brackets original) (quoting *Wright v. Regan*, 656 F.2d 820, 827 (D.C. Cir. 1981). The Supreme Court reversed, stating as follows:

> There can be no doubt that this sort of noneconomic injury is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing. See *Heckler v. Mathews*, 465 U.S. 728, 739-740 (1984). Our cases make clear, however, that such injury accords a basis for standing only to "those persons who are personally denied equal treatment" by the challenged discriminatory conduct, *ibid.*

Allen, 468 U.S. at 755.

Appellant's allegation of stigmatic injury is that "the exclusion of non-theists is divisive and confers an important symbolic benefit upon religion." Complaint at 10, ¶ 37, J.A. at 17. As *Allen* makes clear, allegations of stigmatic injury will not suffice to link a plaintiff personally to the conduct he challenges unless, as in *Heckler*, the plaintiff personally has been denied a benefit. *See Heckler*, 465 U.S. at 741 n.9 (appellee's claim is not a generalized claim of the right to constitutional government of the type Article III rejects "because appellee personally has been denied benefits that similarly situated women receive"). It is thus the denial of a benefit, whether economic or not, that is a basis for standing. We therefore turn to plaintiff's allegation of exclusion injury, his third allegation, as the dispositive allegation of injury in this case. We later return to *Heckler* only to consider whether it helps appellant overcome the causation problems on which our analysis ultimately rests.

3. Exclusion from the House and Senate Chambers

The third claim of injury is that appellant has been deprived, and secular humanists as a class are deprived,

of the opportunity to address either house of Congress as participants in the chaplains' "guest speakers" programs. Paragraphs 38 and 35 of the complaint, fairly read, allege two distinct variations on the exclusion theme. Complaint at 9-10, J.A. at 16-17. The first, reasonably implied in paragraph 38, is that the chaplains' refusal to permit "non-theists" to participate in the guest chaplain programs deprives atheists (and therefore Kurtz) of the opportunity to address the Senate and the House. The second, in paragraph 35, is that Kurtz has been denied the benefit of addressing either house because he does not believe in a deity. The difference between the two injuries, like much in standing law, is both subtle and important. Although the first identifies an injury to Kurtz as a member of a class which is denied any chance to address each house, the second imagines appellant standing at the podium in the Senate and the House chambers but for the chaplains' rejections.

The first allegation, stated another way, is that the chaplains' assent would have given a class of individuals, of which Kurtz is a member, the opportunity to *qualify* to address the House or the Senate, and the opportunity is itself an honor illegally withheld. Such a claim is simply too tenuous. The complaint makes no attempt to allege that the mere fact of receiving a favorable response from Ford or Halverson would have been of any value to Kurtz, aside from its furtherance of his ultimate goal of actually addressing each house. His reply brief makes clear, moreover, that Kurtz' real interest is in "participating in the opening ceremonies." Reply Brief for Appellant at 11.

The second allegation of "exclusion injury" alleges that Kurtz has been prevented from addressing each house of Congress. This allegation satisfies Article III's injury requirement because it is sufficiently personal and concrete. It is the sole allegation of injury reasonably im-

plied in the complaint that is judicially cognizable. It is the sole allegation of injury the court can carry on to the second and third steps in the Article III standing inquiry: causation and redressability.

The allegation is not attack-proof, however, and it is appropriate to explain why one particularly strong challenge to it cannot prevail. As Kurtz will not pray and yet asks to participate in each house's moment of prayer, it could be argued he has excluded himself. An analogy may be drawn to a pacifist Quaker who seeks to be commanding officer of a nuclear ballistic missile submarine, and sues when he is denied the position. In such an instance it could be said that the applicant clings to beliefs that are incompatible with what he desires. The whole theory of appellant's case, however, is that government must be blind to classifications based on theistic belief. If the "guest speaker programs" were in fact only "guest chaplain programs" then, appellant's argument goes, the programs would be unconstitutional. Because the court cannot adjudicate the merits of appellant's constitutional claim at the jurisdictional threshold, these considerations cannot defeat Kurtz' standing.

We must therefore conclude that appellant's complaint of exclusion from the floor of the Senate and the House satisfies Article III's injury requirement.

B. *Causation*

The conduct challenged is the decision of Halverson and Ford to deny Kurtz' requests. Having identified the only allegation in the complaint capable of satisfying Article III's requirements of concerte and personal injury, the question for the court is the following: Is Kurtz' inability to address the Senate or the House fairly traceable to the chaplains' rejection of Kurtz' requests? We conclude that it is not because (1) there is no allegation that the chaplains had discretion to grant appellant's

requests, and (2) such an allegation would in any event be untenable.

The complaint does not allege that Kurtz was standing at the door of the Senate or the House, figuratively speaking, ready to enter and walk to the floor when the chaplains barred his way. Indeed, Kurtz does not even allege that each house has granted its chaplain discretionary authority such that, with the chaplain's assent, there would have been a "substantial probability" of Kurtz addressing either house of Congress. *See Warth*, 422 U.S. at 504. In the absence of an allegation that the chaplains had the power to permit him to address the House and Senate in the manner he sought, the court could not conclude that the chaplains "caused" appellant's exclusion.

Even if appellant had alleged that the chaplains had the authority to grant him floor privileges, such an allegation could not be seriously entertained. The court may take judicial notice of the fact that the opportunity to address either house is a privilege rarely extended to outsiders, and then only with the approval of the members of the respective houses. The President of the United States and foreign heads of state and government are permitted, on special occasions, to address the Senate and the House; but again, only with the approval of members. Even if the chaplains had agreed to invite Kurtz, it would be unreasonable to imagine that they could have provided him with the actual opportunity to deliver non-religious remarks to either house of Congress during the time expressly set aside for prayer.

In addition, members of both houses have expressed strong endorsement of congressional prayer. That fact would further undermine any contention that the leadership of either house has authorized the chaplains to transform the period reserved for prayer into what appellant has styled an "opening ceremony" in which "non-theistic" remarks could be delivered, however uplifting.

House Rule VII states that "[t]he Chaplain shall attend at the commencement of each day's sitting of the House and open the same with prayer." W. Brown, *Constitution —Jefferson's Manual and Rules of the House of Representatives*, H.R. Doc. No. 277, 98th Cong., 2d Sess. § 655 at 330 (1985). Rule XXIV provides that "[t]he daily order of business shall be as follows: First. Prayer by the Chaplain." *Id.* § 878 at 614.

It is clear that members of the House take these rules very seriously. On March 30, 1982, in response to this court's decision in *Murray v. Buchanan*, 674 F.2d 14 (D.C. Cir. 1982) (consitutional challenge to congressional chaplaincy is justiciable), *withdrawn, vacated, and appeal dismissed*, 720 F.2d 689 (D.C. Cir. 1983) (*en banc*), the House unanimously adopted H.R. Res. 413, 97th Cong., 2d Sess., 128 Cong. Rec. 5890-96 (Mar. 30, 1982) reaffirming that its daily sessions shall commence with a prayer by the chaplain. Counsel for Ford asserts with complete persuasiveness that "[t]he House has never intended to initiate a free-for-all in which any interested person could appear for the purpose of self-expression on moral and philosophical issues." Brief for Appellee Ford at 29.

As for the Senate, it has long provided by resolution that "the Chaplain shall open each calendar day's session of the Senate with prayer." S. Res. 8, 76th Cong., 1st Sess., 84 Cong. Rec. 1150 (1939). Senate Rule IV(1)(a) regulates commencement of daily sessions, and provides for "prayer by the Chaplain." *Standing Rules of the Senate*, S. Doc. No. 22, 99th Cong., 2d Sess. 3 (1986). Senate Rule IV (2) refers to the "customary daily prayer by the Chaplain." *Id.* at 4. Given these explicit references to *prayer* in both houses of Congress, it defies belief that Rev. Halverson or Rev. Ford could have provided appellant the privilege on either floor for any purpose other than prayer.

Senate Majority Leader Robert C. Byrd, in an address on the history of the Senate chaplaincy, noted that "the number of guest chaplains is limited to two per month." 126 Cong. Rec. 16,765 (1980). When appellant tried to obtain such a rare invitation, not one senator he contacted agreed to invite him. Were that not impediment enough, Senate and House rules place strict limitations on access to their respective chambers. Senate Rule XXII states: "Other than the Vice President and Senators, no person shall be admitted to the floor of the Senate while in session, except as follows: [list of specific government officials and Senate functionaries]." *Standing Rules of the Senate* at 17-18. Furthermore, any senator may require that an unauthorized person be removed from the chamber upon a point of order made and sustained. See F. Riddick, *Senate Procedure* 675-79 (1981). Thus, even if appellant were to find a senator to sponsor him, and even if Rev. Halverson were to agree to invite him to deliver a non-prayer, it would require action by only one senator to force his expulsion from the chamber. For a comparable rule in the House of Representatives, see L. Deschler and W. Brown, *Procedure in the U. S. House of Representatives* ch. 4. § 3.1 at 26 (1982).

It is true that *if* a chaplain decided to ignore the limits to his authority, and *if* he decided to smuggle Kurtz into his house's chamber, appellant *might* have a chance to attain his goal of addressing the Senate or the House before his purpose was discovered. But Article III requires a chain of causation less ephemeral than a coin tossed into a wishing well. In *Warth*, for example, members of social minorities who challenged restrictive zoning laws were found to be without standing to claim that the laws denied them the opportunity to purchase affordable housing in the area of their choice. Plaintiffs alleged, and the Supreme Court was willing to assume, that the challenged housing ordinance prevented the construction of inexpensive homes, and was designed to deny minorities housing in the town of Penfield, New York.

422 U.S. at 502. The Court acknowledged, moreover, that individual petitioners desired housing in the town and had tried unsuccessfully to find it. *Id.* at 503. It nevertheless denied petitioners standing:

> We may assume, as petitioners allege, that respondents' actions have contributed, perhaps substantially, to the cost of housing in Penfield. But there remains the question whether petitioners' inability to locate suitable housing in Penfield reasonably can be said to have resulted, in any concretely demonstrable way, from respondents' alleged constitutional and statutory infractions. Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a *substantial probability* that they would have been able to purchase or lease in Penfield and that, if the court affords the relief requested, the asserted inability of petitioners will be removed.

Id. at 504 (emphasis added) (citing *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973)). In the case before us, as in *Warth*, appellant has failed to show in any "concretely demonstrable way" that but for his exclusion from the chaplains' "guest speaker" programs, there is a "substantial probability" he would have been able to address a *non*-prayer to one or both houses of Congress.

Thus we are left with little more than appellant's discontent with what he views as a practice that discriminates against secular humanists in violation of the First Amendment. As the Supreme Court pointed out in *Valley Forge*, however, absent a case or controversy a federal court is without authority to address an establishment clause claim, however sincerely advanced: "[T]he philosophy that the business of the federal courts is correcting constitutional errors . . . has no place in our constitutional scheme." 454 U.S. at 489.

C. *The Dissent's Alternative Theories*

The dissent suggests that as "Kurtz did plead, in the alternative, for a funding cut-off, so long as Congress categorically excludes non-theists from opening the legislators' day," he could have amended his pleadings to "assert this 'equal, nonprotection' prayer (for relief): if non-theistic guests are excluded, then theistic guests must be excluded too." Dissent at 12. Invoking *Heckler v. Mathews* and the policies of Fed. R. Civ. P. 15(a) and 54(c), the dissent suggests that the court could order the chaplains to end the guest chaplain programs of the Senate and the House, and thus afford Kurtz a remedy if his complaint had merit. Dissent at 12-14.

This argument is unavailing because it avoids, rather than resolves, the causation analysis essential to any determination of standing whether it be applied to the prayer for relief Kurtz has in fact made or the prayer that the dissent finds in the complaint. Unlike the defendants here, the defendant in *Heckler* had sufficient discretion, but for the challenged statute, to grant the plaintiff the benefits he sought. Here appellant does not challenge a directive from the House or the Senate that their chaplains not admit Kurtz to benefits otherwise available to him. Rather, Kurtz challenges the chaplains' failure to arrogate authority which the complaint does not convincingly allege they had. An order of this court directing the chaplains to discontinue the guest chaplain programs of their respective houses would necessarily assume that the chaplains had authority to do so.

As we noted earlier, *supra* pp. 19-22, the chaplains have no authority to compel either house to accede to appearances of a guest chaplain. Nor may the chaplains themselves terminate the guest chaplain program. *See* Sen. Robert C. Byrd's statement on the History of the Senate Chaplaincy, 126 Cong. Rec. 16,765 (1980) (pointing out that the guest chaplain program originally allowed more than two guests per month, and that when

the then-Senate Chaplain wished to establish the two-per-month limit, he first obtained the permission of then-Senate Majority Leader Lyndon Johnson). Furthermore, if the court were to order the chaplains to discontinue the program, both houses would still have the power to invite guest chaplains to lead them in prayer without the intervention of their official chaplains. While such an order might provoke a conflict on a matter of constitutional principle between the houses of Congress and this court, it would involve a test of political will rather than of law because this court is without authority to act outside the boundaries of Article III.

For the same reasons, we cannot rely on the "substitute parties" doctrine the dissent reads in *Powell v. McCormack*, 395 U.S. 486 (1969). In *Powell* the Court considered an action brought by a duly elected congressman and others complaining of his exclusion from the House of Representatives. During the previous Congress, the House had voted to exclude Congressman Powell from the chamber and to deny him a salary, and directed the appropriate House employees to comply. Congressman Powell named, among others, the Speaker of the House, the Doorkeeper, and the Sergeant-at-Arms. After finding that the congressional defendants were immune from suit under the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1, the *Powell* court held that plaintiffs could challenge the resolution excluding Congressman Powell by proceeding against the employee defendants responsible for implementing it. *Powell*, 395 U.S. at 504.

The *Powell* Court did not cure a problem of Article III standing by substituting parties, but only a problem of immunity under the Speech or Debate Clause. More fundamentally, in this case there is no basis for concluding that the chaplains were implementing an unconstitutional directive from their superiors when they rejected Kurtz' requests for invitations to address each house. In *Powell* the Sergeant-at-Arms and Doorkeeper of the

House, pursuant to the challenged resolution, respectively refused to disburse a salary to a duly elected congressman and denied him access to the House floor. The Court stressed that the congressional "employees are acting pursuant to express orders of the House. . . ." *Id.* By contrast, it is not within the chaplains' responsibilities to pass upon unorthodox requests to address either house of Congress, and there is no allegation that the Senate or the House directed its respective chaplain to exclude Kurtz, as the House excluded Congressman Powell.

Far from barring judicial review of "most actions of Congress," Dissent at 11, today we hold only that a plaintiff challenging a government official's refusal to grant him a benefit must credibly allege that the defendant could have granted the benefit but for unlawful conduct. While appellant in this case strives to show the chaplains acted unlawfully, he can make no showing that their actions mattered.

III. Conclusion

This suit concerns appellant's attempt to compel the chaplains of the Senate and the House to allow him to address secular remarks in their respective chambers during the periods explicitly reserved for prayer. As appellant has not alleged, and cannot plausibly allege, that the chaplains have the authority to satisfy his requests, the cognizable injury he alleges is not fairly traceable to them. Therefore this dispute is not one "traditionally thought to be capable of resolution through the judicial process," *Allen*, 468 U.S. at 752 (quoting *Flast*, 392 U.S. at 97). The district court's judgment on count one is vacated, and the case is remanded with instructions to dismiss the complaint for lack of subject matter jurisdiction under Article III of the Constitution.

So ordered.

RUTH B. GINSBURG, *Circuit Judge, dissenting from the court's standing disposition*: In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Supreme Court decided on the merits a challenge to the prayer practice of the Nebraska legislature. Relying upon a tradition "unbroken . . . for two centuries in the National Congress," *id.* at 795, the Court held that no establishment clause violation occurs when a state legislature engages a chaplain and uses public funds to pay for the chaplain's services. Controlled by *Marsh*, and following this court's lead in *Murray v. Buchanan*, 720 F.2d 689 (D.C. Cir. 1983) (*en banc*),[1] the district court rejected as insubstantial Kurtz's claim of a constitutional right to bid for a "guest speaker" invitation to the opening of a House or Senate day. *Kurtz v. Baker*, 630 F. Supp. 850 (D.D.C. 1986). Accordingly, the district court granted the defendants' motions for summary judgment. I would affirm that disposition.

The majority rests its decision on "standing." In a complicated opinion, my colleagues blend several concepts one might group under the general heading "justicia-

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[1] In *Murray*, federal taxpayers sought to challenge payment of salaries and certain expenses for chaplains of the Senate and House of Representatives. We reviewed the parties' presentations in light of *Marsh* and concluded that the Supreme Court had answered the question *Marsh* presented with "unmistakable clarity": opening each legislative day with prayer by a chaplain paid out of the public funds does not violate the establishment clause of the first amendment. We then (1) dismissed the appeal; (2) vacated the judgment of the district court, which had dismissed the complaint, without considering the merits, on "standing" and "political question" grounds; and (3) remanded the case with instructions to dismiss the complaint "for want of a substantial constitutional question." *Murray*, 720 F.2d at 690; *see* Kurtz v. Baker, 630 F. Supp. 850, 855 (D.D.C. 1986) (observing that this court dismissed the claim in *Murray* "not for lack of standing, but for failure to state a viable constitutional claim," and that "the *Marsh* Court recognized plaintiff's standing to raise a similar claim").

bility." I cannot join in their amalgamation of the questions: *who* may complain of allegedly unlawful government action; *against whom* may such actions be brought; *what kinds of issues* may courts legitimately adjudicate; when does a complaint fail to state a tenable claim for relief. I therefore set out the less complex resolution I would provide for this case. I then comment on infirmities in the majority's standing solution.

I.

To recapitulate what the court spreads out elaborately, plaintiff-appellant Paul Kurtz is a professor of philosophy and a leader of the humanist movement. He wishes to deliver what he terms "opening remarks" at a daily session of the House or Senate. The official Senate and House chaplains occasionally invite guest chaplains to deliver the opening prayer required by the rules of each chamber. Calling these invitations "guest speaker programs," Kurtz complains that the chaplains of both chambers have refused to consider him as a "guest speaker" because his remarks would not invoke any deity.

Kurtz maintains that the freedom of speech and establishment clauses of the first amendment, and the due process clause of the fifth amendment, secure his right to receive consideration as a guest speaker at "opening ceremonies have until now consisted exclusively of prayer. The district court, instructed by the Supreme Court's 1983 exposition in *Marsh v. Chambers*, 463 U.S. 783, reached and definitely rejected Kurtz's claim of a constitutional right not to be excluded, because he is a nontheist, from the opportunity to speak in place of, or share the podium with, a congressional chaplain. *Kurtz v. Baker*, 630 F. Supp. 850 (D.D.C. 1986). I would affirm for the reasons well-stated in the district court's cogent opinion.

Kurtz, it bears emphasis, has misdescribed what the rules of Congress authorize. Neither the House nor the Senate authorizes its chaplain to conduct "opening ceremonies" or "speaker programs." The relevant rules provide simply and specifically for the chaplains' delivery of "prayer." U.S. Senate Rule IV, § 1(a) (Presiding Officer takes the chair "following the prayer by the Chaplain"); U.S. House of Representatives Rule VII (Chaplain shall open each day's sitting "with prayer"); U.S. House of Representatives Rule XXIV, § 1 ("The daily order of business shall be as follows: First. Prayer by the Chaplain."). The congressional chaplains have no warrant themselves to utter words that do not compose a prayer, and they have no commission from the House or Senate to engage others to extend remarks of a secular character.[2]

The *Marsh* approach and analysis, assiduously followed by the district court, also provided the basis for this court's *en banc* disposition in *Murray v. Buchanan*, 720 F.2d 689 (D.C. Cir. 1983). *See supra* note 1. *Marsh* rejected on the merits a first amendment-establishment clause challenge to the Nebraska legislature's practice of beginning each session with a prayer by a chaplain paid by the state. The Supreme Court traced "[t]he unbroken practice for two centuries in the National Congress," *Marsh*, 463 U.S. at 795, and noted the variety of systems in the states: "several . . . choose a chaplain who serves for the entire legislative session"; "[i]n other states, the prayer is offered by a different clergyman each day"; some states pay their chaplains and others do not." *Id.* at 794 n.18. The common feature, however, as the Court observed, is the invocation of "Divine guidance." *Id.* at

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[2] In accord with the district court, *see* 630 F. Supp. at 856-57, I find no threshold blockage to Kurtz's claim against the chaplains and Treasury officers by reason of the Speech or Debate Clause. While inspirational, prayer in Congress does not appear to be "integral to lawmaking." *See* Walker v. Jones, 733 F.2d 923 (D.C. Cir.), *cert. denied*, 469 U.S. 1036 (1984).

792. Prayer to open each legislative day, the Court stated, was a religious observance acceptable to the drafters of the first amendment, *id.* at 790-91, and is today "part of the fabric of our society." *Id.* at 792.

In light of *Marsh*, we held in *Murray* that a federal taxpayer's establishment clause challenge to the payment of salaries to congressional chaplains "fail[ed] to raise a substantial constitutional question." *Murray*, 720 F.2d at 690. Kurtz's challenges are no less vulnerable.

The House and Senate rules Kurtz imaginatively reads to allow for "ceremonies" and "guest speakers" in fact authorize opening legislative sessions *with prayer*, nothing more and nothing else. Kurtz recognizes that *Marsh* accepted legislative prayer against an establishment clause objection; he points out, however, that *Marsh* did not involve free speech and due process contentions by one who seeks an opportunity to participate personally as a speaker. But the existing legislative prayer practice, *Marsh* plainly indicates, fits into a special nook—a narrow space tightly sealed off from otherwise applicable first amendment doctrine. As to the establishment clause, Justice Brennan described *Marsh* as "carving out an exception . . . rather than reshaping . . . doctrine to accommodate legislative prayer." *Marsh*, 463 U.S. at 795, 796 (Brennan, J., dissenting). I think it fair to infer that the Supreme Court would appraise the free speech claim proffered by Kurtz in the same manner it appraised the establishment clause claim proffered by *Marsh*, and with the same result. Kurtz's argument to the contrary exhibits little realism and large indulgence in wishful thinking.

Kurtz, I stress, does not want to take part in the session opening traditionally maintained by Congress, for that opening does not include secular remarks. Kurtz's claim, therefore, is inevitably an attack on Congress' customary, opening-with-prayer observance. The prayer practice that has existed in legislative assemblies in the

United States for "more than 200 years," *Marsh*, 463 U.S. at 792, I conclude, is not subject to constitutional assault given the High Court's recent and resounding declaration. Because of the "unique" historical roots of prayer to open the legislature's day, *see id.* at 791, and the status of prayer in that context, unadorned by surrounding ceremony, as "part of the fabric of our society," *id.* at 792, Kurtz has, under current jurisprudence, no tenable free speech, establishment clause, or due process claim to advance.[3] I would so hold directly and would not avoid the question by a circuitous determination that Kurtz lacks standing to seek its settlement.

II.

The majority ultimately recognizes that Kurtz's complaint satisfies Article III's injury-in-fact requirement.[4]

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[3] *Marsh* essentially affirmed that the historic practice of an opening prayer burdens no "fundamental right" of non-theists. Thus Kurtz cannot salvage his failed first amendment claim by cloaking it in a fifth amendment due process (equal protection component) mantle. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 54-55 (1983) (entitlement-to-access argument that Court rejected under first amendment, freedom-of-speech rubric "fares no better in equal protection garb").

[4] On the way, the majority indicates that the Supreme Court takes a restrictive view of standing in "litigation present[ing] a claim that is non-traditional." Court's Opinion at 9 (citing, exclusively, cases in which the Court found no standing). I agree, in general. *But see, e.g.*, Orr v. Orr, 440 U.S. 268 (1979); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (all taking a generous view of, and upholding standing in "non-traditional" cases).

Curiously, also in passing, the majority suggests that this case is distinguishable from Flast v. Cohen, 392 U.S. 83 (1968), because that case involved an exercise of "congressional power" while this one involves only "internal practices of *each* house of Congress." Court's Opinion at 13 (emphasis in original). But the authority

"The whole theory of [Kurtz's] case," as Judge Buckley accuratedly captures it, "is that government must be blind to classifications based on theistic belief." Court's Opinion at 18. Because the House and Senate do classify based on theistic belief, *i.e.*, their Rules afford room for a "guest chaplain program," but not for a "guest speaker program," Kurtz is denied *the opportunity* to have his request considered. Denial of that opportunity, Kurtz contends, is unconstitutional.

Although they acknowledge that Kurtz meets the core, injury-in-fact requirment, my colleagues nonetheless conclude that Kurtz lacks standing because he cannot show causation, *i.e.*, that his injury is "traceable to the chaplains' rejection of Kurtz' requests" for a guest speaker bid. *Id.* at 18. The majority emphasizes that the chaplains lacked authority to grant Kurtz's requests in fact of the firm will of Congress, expressed in its internal Rules, to open sessions with prayer; they then maintain, essentially, that Congress made and *only Congress* can unmake the Rules determining that prayer will be the exclusive benediction upon the opening of legislative sessions. *See id.* at 19-21. If this is indeed the pivotal point, then the majority—notwithstanding its use of a "standing" label—is deciding not *who* may sue, but an anterior question, *viz.*, *what issues* are legitimately open to third branch resolution.

Under my colleagues' analysis, as I understand it, the court would find Kurtz's claim beyond judicial competence no matter who challenged Congress' Rules. A

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cited, Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 479 (1982), distinguishes between legislative ("congressional") *and executive* action. To the distinctions between actions legitimately taken in the legislative, executive, or judicial departments, my colleagues would apparently add a fourth category: legitimately legislative, but not "congressional."

member of Congress, unless I miss the majority's meaning, would fare no better. *But cf. Marsh*, 463 U.S. at 786 n.4 (upholding complainant's standing both as a Nebraska legislator and as a taxpayer). If the perceived infirmity is the invulnerability of Congress' Rules to judicial review rather than the identity of the challenger, however, then is not the majority's position one most appropriately placed under the headline "political question"?[5]

Perhaps the majority resists such placement because it recognizes that "political question" is a "weak" doctrine, *see* Court's Opinion at 7,[6] while standing decisions are today more prominent and, in general, more restrictive than once was the case.[7] But the Supreme Court has not yet abandoned the position that

> [t]he fundamental aspect of standing is that it focuses on the party [and] not on the issues he wishes to have adjudicated. . . . In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable.

Flast v. Cohen, 392 U.S. 83, 99-100 (1968); *see also, e.g.*, D. CURRIE, FEDERAL COURTS: CASES AND MATERIALS 71 (3d ed. 1982) (standing asks *who* is a proper party to litigate). If that clear statement is no longer operative, the Supreme Court and not my colleagues should be the tribunal to recall the declaration. *But see* Court's Opin-

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[5] *Cf.* Court's Opinion at 24 (indicating that, at bottom, the issue Kurtz would air in court is properly branded a "political" matter rather than a matter "of law").

[6] *See generally* Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L. J. 597 (1976).

[7] *See, e.g.*, C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 60 (4th ed. 1983) (commenting, in relation to vacillations in case law, that "[a]bout all that is certain on the subject is that the last work has not yet been written").

at 14. Until instructed otherwise by Higher Authority, therefore, I remain persuaded that

> clarity [is] gained by viewing standing as involving problems of the nature and sufficiency of the litigant's concern with the subject matter of the litigation, as distinguished from problems of the justiciability—that is, the fitness for adjudication—of the legal questions which he tenders for decision.

H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 156 (P. Bator, P. Mishkin, D. Shapiro & H. Wechsler 2d ed. 1973).

The political question doctrine, to the extent that it still holds sway,[8] is—in contrast to "standing" law—unconcerned with the identity of the plaintiff and instead focuses on whether the *issue* is one appropriate for judicial determination. *E.g., Coleman v. Miller*, 307 U.S. 433 (1939); *Goldwater v. Carter*, 444 U.S. 996, 1005-06 (1979) (Rehnquist, J., concurring in the judgment) (questions properly characterized "political" are, regardless of the challenger, nonjusticiable—they may not be addressed by courts at all). My colleagues' concerns with Kurtz's issues are precisely those that the political question doctrine addresses. The most telling characteristic of a political question, under the Supreme Court's current formulation, is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr*, 369 U.S. 186, 217 (1962). Defendants, as the majority indicates, *see* Court's Opinion at 8, urge that the "constitutionally valid rule" of the Senate and House represent an exercise of author-

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[8] For modern applications, see Gilligan v. Morgan, 413 U.S. 1 (1973) (Article I, section 8, clause 16 commits to Congress the authority to provide for "organizing, arming and disciplining the Militia"—now the National Guard); Roudebush v. Hartke, 405 U.S. 15 (1972) (Article I, section 5 commits to the Senate the final decision of which candidate "received more lawful votes" in an election for a Senate seat). *But cf.* Henkin, *supra* note 6.

ity textually committed by the Constitution to the legislative branch. *See* Brief of Appellee Halverson at 16-17; Brief for Appellees Baker and Ortega at 16-22. That is no doubt true, but who has the final say whether Congress' Rules are "constitutionally valid"?

The Constitution does indeed commit to each House the making of "the Rules of its proceedings," Article I, section 5, clause 2, and further provides that each House "shall chuse [its] Officers." Article I, section 2, clause 5 (House); Article I, section 3, clause 5 (Senate). But Congress' Rules and their implementation "may not . . . ignore constitutional restraints or violate fundamental rights," and on that score—and that score only—they are subject to judicial review. *United States v. Ballin*, 144 U.S. 1, 5 (1892).[9] In the case at hand, Congress' Rules and their implementation by the chaplains are not matters still open for judicial consideration, but that is so only because the Supreme Court has already settled the question *on the merits*. Accepting *Marsh*, it is not possible tenably to argue that the first amendment checks opening ceremonies of Congress consisting exclusively of prayer.

In sum, as best as I can gather from reading the majority opinion, my colleagues do not really question "the nature and sufficiency of [Kurtz's] concern with the subject matter of the litigation"; they are, instead, anx-

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[9] Their "advantages or disadvantages," "wisdom or folly," of course, are not matters for judicial consideration. United States v. Ballin, 144 U.S. 1, 5 (1892). This court has observed that the general rule that "there is no warrant for the judiciary to interfere with the internal procedures of Congress" applies "where constitutional rights are not violated." Exxon Corp. v. FTC, 589 F.2d 582, 590 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 943 (1979). *Cf.* Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n, 515 F.2d 1341, 1347-48 & n.13 (D.C. Cir. 1975) (stopping short of resting on "political question" abstention with respect to a House rule because of contention that the rule ignored constitutional restraints).

ious about "the fitness for adjudication" of the questions he tenders for decision. *See supra* p. 6. Their anxiety is unwarranted. The questions Kurtz raises have already been resolved by the Supreme Court, expressly or by clear implication, in *Marsh*. We need do no more—and should do no less—than say so.

III.

Just as the majority would overlook Supreme Court jurisprudence and our own if it assumed that Congress' Rules and their implementation are immune from judicial review for constitutionality, *see supra* p. 9 & n.9, so it would neglect precedent if it supposed that the officers who do not make but merely execute congressional policy are the wrong persons to sue. That supposition, however, appears to infect Judge Buckley's "no causation" ruling. He states that unless Kurtz could plausibly allege that the chaplains "had the power to permit him to address the House and Senate in the manner he sought, the court could not conclude that the chaplains 'caused' appellant's exclusion." Court's Opinion at 19.

The extraordinary view of "causation" that statement can be read to imply cannot seriously be entertained, for it is commonplace in our system to sue implementing officers, although—apart from the court's decree—they have (in Judge Buckley's words) no "discretion to grant [the suitor's] requests." *See id.* In *Powell v. McCormack*, 395 U.S. 486 (1969), for example, Adam Clayton Powell, Jr., challenged the constitutionality of a House resolution preventing him from taking his seat, although he was duly elected and met the age, citizenship, and residence requirements of Article I, section 2, clause 2. Powell named as defendants both members of Congress who voted for the resolution and congressional employees who implemented it. He alleged that the House Clerk refused to administer the oath, the Sergeant at Arms refused to pay him his salary, and the Doorkeeper threatened to deny him admission to the House chamber. The

Supreme Court found that the Speech or Debate Clause required dismissal of the action against members of Congress, but did not bar proceeding against the congressional employees. If today's panel majority "no causation" reasoning were operative, however, then the Court in *Powell*—on its own initiative—should have dismissed the complaint against the employees for lack of standing for, unquestionably, the officers Powell named, like the chaplains here, lacked "discretion to grant [the suitor's] requests." *See also, e.g., Heckler v. Mathews*, 465 U.S. 728 (1984) (in constitutional challenge to Act of Congress, plaintiff properly sues Secretary charged with enforcement); *Marsh v. Chambers*, 463 U.S. 783 (1983) (in challenge to state legislature's prayer practice, plaintiff properly sues State Treasurer who provides funding); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (in challenge to President's Executive Order, plaintiff properly sues cabinet officer who executed direction).

Were public officers not proper parties in a constitutional challenge to congressional measures—because such officers lack discretion to act in opposition to the legislature's directives—then most actions of Congress would be immune from judicial review. The Speech or Debate Clause would shelter members of Congress, and public officers, even if not protected by that clause, would drop out on "standing" grounds. This is surely not the law. Those who execute Congress' policy are properly sued because they cause plaintiff an injury that is remedial when the judiciary declares the action unconstitutional. "[I]t is an 'inadmissible suggestion' that action might be taken in disregard of a judicial determination." *Powell*, 395 U.S. at 549 n.86, quoting *McPherson v. Blacker*, 146 U.S. 1, 24 (1892).

Moreover, while acknowledging that "where a party's standing is challenged in a motion to dismiss, a reviewing court 'must construe the complaint in favor of the complaining party,'" Court's Opinion at 11 (citing

Warth v. Seldin, 422 U.S. 490, 501 (1975)), the majority ignores or misperceives Kurtz's alternative plea, or reads that plea with a rigidity inconsonant with Rules 15 and 54(c) of the Federal Rules of Civil Procedure. The former rule provides that "leave [to amend a pleading] shall be freely given when justice so requires"; the latter calls for relief to which party "is entitled," even if not demanded in his pleading.

Kurtz did plead, in the alternative, for a funding cutoff, so long as Congress categorically excludes non-theists from opening the legislators' day. Joint Appendix at 20. In other words, Kurtz sought redress, through denial of funding for the chaplaincies, so long as those offices function in a manner he assails as unconstitutional. And it should be recalled that *Kurtz prevailed on standing*, although not on the merits, *in the district court*. With fair notice of Judge Buckley's "no causation" view, Kurtz might well have amended his complaint to fit a now familiar mold. Kurtz might have asserted this "equal, nonprotection" prayer (for relief): if non-theistic guests are excluded by the houses of Congress, each acting through its official chaplain, then theistic guests must be excluded too.

In *Heckler v. Mathews*, 465 U.S. 728 (1984), to cite a recent example of the "equalize down" genre, a male plaintiff challenged a law that allocated Social Security benefits in a way that allegedly distinguished impermissibly on the basis of sex. The law contained a severability clause which provided that the relevant benefit would be *denied to everyone* in the event the challenged gender line was struck down. Thus, there was no way that the plaintiff could in fact receive the benefits for which he applied, even if his constitutional argument prevailed. Despite the unavailability of the sole affirmative relief plaintiff requested, the Supreme Court unanimously found standing to sue. The Court reasoned:

> [T]he right to equal treatment guaranteed by the Constitution [a right Kurtz plainly asserts in the

> case at hand] is not coextensive with any substantive rights to the benefits denied the party discriminated against. Rather, . . . discrimination itself . . . can cause serious noneconomic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group. . . . [W]hen the "right invoked is that to equal treatment," the appropriate remedy is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class. . . . Because the severability clause would forbid only the latter and not the former kind of relief in this case, the injury caused by the unequal treatment allegedly suffered by [plaintiff] may "be redressed by a favorable decision," . . . and [plaintiff] therefore has standing to prosecute this action.

Heckler v. Mathews, 465 U.S. at 739-40 (citations and footnotes omitted) (emphasis in original).[10]

Just as Mathews argued that, for Social Security pension purposes, government must be blind to classifications based on sex, so Kurtz argues "that government must be blind to classifications based on theistic belief." If the negative decree prospect sufficed to establish standing in *Heckler v. Mathews*, that prospect should serve as well in the instant case. *See also Orr v. Orr*, 440 U.S. 268, 272 (1979) (male plaintiff had standing to challenge one-way alimony, though he sought no alimony for himself, and likely would remain obligated to pay alimony even if he prevailed on his equal protection argument); *Stanton v. Stanton*, 421 U.S. 7, 17-18 (1975)

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[10] Had there been no severability clause, the Secretary still would have lacked any "discretion" to grant [plaintiff Mathews] the benefits he sought." *Compare* Court's Opinion at 23 *with, e.g.*, Weinberger v. Salfi, 422 U.S. 749, 765 (1975) (constitutionality of statutory classification is a matter "beyond [the Secretary's] jurisdiction to determine").

(although prevailing on federal constitutional issue, appellant "may or may not ultimately win her law suit").

The majority furthermore reports its recognition that "the court cannot adjudicate the merits of [a] constitutional claim at the jurisdictional threshold." Court's Opinion at 18. Under its analysis, therefore, Kurtz would fail on "causation" whatever the categorical nature of his exclusion—his nontheistic belief, *cf. Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring in result), his religious creed, his race, his national origin, or his sex. Suppose, for example, that the House or Senate directed its chaplain to invite only Protestant ministers, only Baptists, only clergy who are white, male, and born in the U.S.A. According to the majority, no cleric in an excluded category would have standing to complain. The precedent canvassed in *Heckler v. Mathews*, 465 U.S. at 737-40, however, points precisely in the opposite diection.

CONCLUSION

For the reasons stated, I must dissent from the extraordinary "standing" disposition the court has announced.[11] However, after *Marsh*, it is evident that Kurtz has stated no federal question of genuine substance.[12] On that basis, I would affirm the district court's decision.

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[11] *All* defendant-appellees, I note, sought affirmance, not vacation, of the district court's decision. *See* Brief for Appellees Baker and Ortega at 37; Brief of Appellee Halverson at 17; Brief for Appellee Ford at 30 (district court's final judgment was correct).

[12] Because the issue on the merits has been securely settled by the Supreme Court, there is no occasion in this case to indulge in any "passive virtue." *Compare* Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 42 (1961) (including among "passive virtues"—devices available to the Supreme Court to avoid decision of discomforting constitutional issues—"standing," "case and controversy," "ripeness," and "political question"). *But see* Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-2919

DR. PAUL KURTZ,

Plaintiff,

v.

JAMES A. BAKER, SECRETARY OF THE TREASURY, *et al.*,

Defendants.

[Filed Mar. 11, 1986]

MEMORANDUM

In this action, plaintiff challenges certain practices of the Chaplain of the United States House of Representatives and the Chaplain of the United States Senate. Plaintiff is a professor of philosophy and a secular humanist. Defendants are the Secretary of the Treasury, the Treasurer of the United States, the Chaplain of the House and the Chaplain of the Senate.

Plaintiff's complaint contains two counts. Count I challenges the administration of an informal program whereby both the House and Senate Chaplains allow guest chaplains to give the morning prayer (guest chaplain program). Plaintiff alleges that he wrote to both Chaplains requesting the opportunity to appear as a guest speaker and to deliver the opening remarks at a daily session of the House or Senate. In his application letters, plaintiff made clear that his remarks would not

invoke a diety. Both Chaplains rejected plaintiff's request, stating as one of their reasons that plaintiff would not offer a prayer during his opening. Plaintiff alleges that the guest chaplain program discriminatorily excludes non-theists in violation of the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment, and the Due Process Clause of the Fifth Amendment, of the United States Constitution. Plaintiff seeks to enjoin the allegedly discriminatory practice and seeks a declaration that the practice is unconstitutional. In the alternative, plaintiff seeks termination of federal funding of the House and Senate chaplaincies.

Count II alleges that the Senate Chaplain "has routinely used his opening remarks as a vehicle for disparaging the beliefs of non-theists . . ." Complaint at ¶ 44 (filed Sept. 19, 1984). Plaintiff alleges that the Senate Chaplain's remarks violate the Establishment Clause of the First Amendment. Plaintiff seeks a permanent injunction to restrain all present and future chaplains from making disparaging remarks concerning the beliefs of non-theists, and a declaration that the making of such remarks by a chaplain is unconstitutional. In the alternative, plaintiff seeks the termination of federal funding of the chaplaincies.

This action is now before the Court on defendants' motions to dismiss or for summary judgment,[1] and plaintiff's motion for summary judgment on Count II. Motion of Defendants Regan and Ortiz to Dismiss or in the Alternative for Summary Judgment (filed Dec. 19, 1984); Motion of Defendant Senate Chaplain to Dismiss or for Summary Judgment (Senate Chaplain's Mem.) (filed Dec. 19, 1984); Defendant Chaplain Ford's Motion to Dismiss (House Chaplain's Mem.) (filed Dec. 21,

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[1] Defendants have filed three separate motions, but because they all raise substantially the same issues, defendants' arguments will be referred to collectively.

1984); Plaintiff's Motion for Partial Summary Judgment (Plaintiff's Mem.) (filed Feb. 4, 1985).

I.

A.

The Supreme Court's decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), provides the guidelines for resolution of Counts I and II. In *Marsh*, a state legislator and taxpayer brought an action challenging the practice of the Nebraska legislature of opening each session with a prayer by a chaplain paid with public funds. The Supreme Court, per Chief Justice Burger, found that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply imbedded in the history and tradition of this country." 463 U.S. at 786. The Court continued:

> Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent.
>
> . . .
>
> . . . It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.

Id. at 790. The Court concluded:

> This unique history leads us to accept the interpretation of the First Amendment draftsmen who

> saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged.
>
> . . . .
>
> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among people of this country. As Justice Douglas observed, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306 (1952).

Id. at 791-92.

After finding the practice of opening legislative sessions with a prayer invoking Divine guidance to be constitutional, the Court then examined whether any particular features of the Nebraska practice violated the Establishment Clause. The particular features examined were:

> first, that a clergyman of only one denomination—Presbyterian—has been selected for 16 years; second, that the chaplain is paid at public expense; and third, that the prayers are in the Judeo-Christian tradition.

Id. at 793 (footnotes omitted).

The Court found thta the chaplain's long tenure did not in effect give impermissible preference to his religious views, noting the practice in Nebraska of inviting guest chaplains. The Court found remuneration of the chaplain by public funds to be "grounded in historic prac-

tice initiated . . . by the same Congress that drafted the Establishment Clause of the First Amendment," *id.* at 794, and thus constitutionally acceptable. As to the fact that the prayers given were in the Judeo-Christian tradition, the Court held that

> [t]he content of the prayer is not of concern to judges, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

Id. at 794-95

Justice Brennan, joined by Justice Marshall, dissented from the Court's opinion. Justice Brennan argued that "legislative prayer [viewed] through the unsentimental eye of our settled doctrine," *id.* at 796 (Brennan, J., dissenting), clearly violates the three-pronged test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971): its purpose is religious, not secular; its primary effect advances a particular religion, and religion in general; and it fosters excessive entanglement of government with religion. As to the application of Establishment Clause doctrine, Justice Brennan concluded:

> I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional.

Id. at 800-01 (footnote omitted). Justice Brennan also examined the historical purpose of the Establishment Clause and found "the regularized practice of conducting official prayers, on behalf of the entire legislature, as part of the order of business constituting the formal opening of every single session of the legislative term," *id.* at 813, to violate that purpose. Finally, Justice Brennan questioned the Court's reliance "on a narrow piece

of history," *id.* at 817, and found the Establishment Clause violation resulting from the practice of legislative prayer far from *de minimus*.

Justice Stevens also dissented from the Court's opinion, noting:

> The Court declines to "embark on a sensitive evaluation or to parse the content of a particular prayer." . . . Perhaps it does so because it would be unable to explain away the clearly sectarian content of some of the prayers given by Nebraska's chaplain. Or perhaps the Court is unwilling to acknowledge that the tenure of the chaplain must inevitably be conditioned on the acceptability of that content to the silent majority.

Id. at 823-24 (Stevens, J., dissenting) (footnote omitted).

B.

Another case crucial as background for this action is *Murray v. Buchanan*, 720 F.2d 689 (D.C. Cir. 1983) (en banc). Plaintiffs in that case challenged the payment of salaries and certain expenses for the House and Senate Chaplains, and Act of Congress authorizing the appropriating funds for those expenditures. After argument of the appeal before the *en banc* Court of Appeals, the Supreme Court decided *Marsh*. The Court directed the parties to show cause why, in light of *Marsh*, the appeal should not be dismissed for failure to raise a substantial constitutional question. The Court concluded:

> We perceive no tenable basis for a claim that the very congressional practice deliberately traced by the Court in *Marsh* should be subject to further review.

720 F.2d at 690. The Court dismissed the appeal, vacated the judgment of the district court, and remanded with instructions to dismiss the complaint for want of a substantial constitutional question.

II.

Defendants first raise several jurisdictional concerns. They argue that plaintiff lacks standing to raise his claims, that his challenges present nonjusticiable political questions, and that his action is barred by the Speech and Debate Clause of the Constitution, U.S. Const. Art. I, § 6, cl. 1.

A.

1.

In their challenge to plaintiff's standing as to Count I, defendants argue that plaintiff has failed to meet the standing requirements of Article III of the Constitution affirmed by the Supreme Court in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). To demonstrate that he has standing, a plaintiff must show:

> ". . . that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).

454 U.S. at 472 (footnote omitted).

Defendants argue that no one has the right to address Congress on topics of their personal concern, citing *Minnesota State Board for Community Colleges v. Knight*, 104 S.Ct. 1058, 1065 (1984). They contend that plaintiff's claim is merely that Congress should listen to his point of view, and as such, establishes no actual injury. Plaintiff's claim, however, is more specific. He argues that he has standing under the Free Speech Clause of the First Amendment because "he has been refused the opportunity to speak at a limited public forum (or non-

public forum)." Plaintiff's Mem. at 38-39. *See Perry Education Assoc. v. Perry Local Educators' Assoc.*, 460 U.S. 37 (1983). Although it may be true that citizens do not generally have the right to address Congress on topics of personal concern, a limited public forum or a nonpublic forum is created specifically by the government's opening of a certain forum for expressive activity even though it is not obliged to do so. *Id.* at 45; *Widmar v. Vincent*, 454 U.S. 263, 267-68 (1981). Once the government has created a limited public, or nonpublic, forum, it is prohibited, at a minimum, from denying access to a speaker who wants to speak on an otherwise includible subject on the basis of the viewpoint the speaker intends to address. 460 U.S. at 46.

Plaintiff argues that by opening their podiums to other chaplains who desire to give opening remarks to Congress, each Chaplain has created a limited public forum or a nonpublic forum for opening remarks. As such, plaintiff's argument is that he has discriminatorily been denied access to express his viewpoint. As to the specific requirements set out in *Valley Forge*, *supra*, plaintiff first demonstrates that he personally requested, and was denied, access to this particular forum on the grounds that his viewpoint was inappropriate. Plaintiff has thus demonstrated a grievance more specific that the general grievance of a citizen who wants to address Congress on an issue of concern. Second, plaintiff alleges that the defendant Chaplains' conduct in denying him access directly caused his alleged injury. Finally, he claims to meet the third *Valley Forge* requirement for standing in that a decision in his favor would provide him with relief. Here, plaintiff's injury could be redressed either by an order or declaration holding that the basis for denying access to him is unlawful, or an order terminating the funding of the chaplaincies and thereby abolishing the forum at issue. Plaintiff thus meets the Article III requirements for standing under Count I of his complaint.

2.

Under Count II of plaintiff's complaint, defendants again argue that plaintiff's claim that the Senate Chaplain disparages non-theism is only a generalized claim of disagreement with the practice of legislative prayer which was found constitutional by the Supreme Court in *Marsh*. But, plaintiff argues, citing specific language in *Marsh*, 463 U.S. at 794-95, that the Supreme Court in that case inferentially, but clearly, disapproved of the use of traditional legislative prayer to disparage any other faith or any other belief than that espoused by the authorized prayer giver. Plaintiff's claim that the Senate Chaplain disparages non-theism is not merely a claim of general affront, but represents a specific claim that the statements of this person supported by congressionally-appropriated funds violate the Establishment Clause. The Supreme Court in *Flast v. Cohen*, 392 U.S. 83 (1968), held that even an individual taxpayer has standing to challenge congressional expenditures which allegedly violate the Establishment Clause. Plaintiff is here not only as a taxpayper, but as a petitioner for an opportunity to participate in Congress' opening ceremonies. Suffice it to say here, however, as this Court noted in the companion case to this action, in which this same plaintiff challenged the printing and binding of the Chaplains' prayers:

> [A] taxpayer retains standing to challenge the use of appropriated funds in ways that violate the Establishment Clause of the First Amendment.

Kurtz v. Kennickell, 622 F. Supp. 1414, 1416 (D.D.C. 1985). Moreover, the Court in *Murray* dismissed a similar claim, not for lack of standing, but, for failure to state a viable constitutional claim after the Supreme Court's decision in *Marsh*. And, the *Marsh* Court recognized plaintiff's standing to raise a similar claim. *See also Katkoff v. Marsh*, 582 F. Supp. 463, 467-71 (E.D.N.Y. 1984), *affd. in pertinent part*, 755 F.2d 223

(2d Cir. 1985). Plaintiff here thus has standing to raise his claim under Count II.

B.

Defendants argue that plaintiff's action presents a political question made nonjusticiable by the principles articulated in *Baker v. Carr*, 369 U.S. 186 (1962), and thus should be dismissed. Specifically, defendants argue that the Constitution allows the House and Senate to determine their rules of procedure, U.S. Const. Art. I, § 5, and thus reflects a "textually demonstrable constitutional commitment" of the issues presented to the Legislative Branch. *Powell v. McCormack*, 395 U.S. 486, 517 (1969). Plaintiff points out, however, that his challenges are not directly to rules of procedure: no House or Senate rule authorizes the Chaplains to invite guest chaplains, and no rule authorizes disparagement of others' beliefs by the Chaplains. Moreover, our Court of Appeals recently made clear that the political question doctrine does not preclude review of House and Senate rules for their constitutionality, stating:

> . . . Article I simply means that neither we nor the Executive Branch may tell Congress what rules it must adopt. Article I does not alter our judicial responsibility to say what rules Congress may not adopt because of constitutional infirmity.

Vander Jagt v. O'Neill, 699 F.2d 1166, 1173 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983); *see United States v. Ballin*, 144 U.S. 1, 5 (1892) ("[Congress] may not by its rules ignore constitutional restraints . . ."). The Court of Appeals' apparent willingness to dispose of similar claims on the merits in *Murray* is also persuasive.

Here, plaintiff does not directly challenge House or Senate rules. He challenges the discretionary behavior of their chosen Chaplains. The Chaplains occupy pub-

licly-funded offices and thus their conduct in those offices is subject to judicial scrutiny for adherence to the Constitution.

C.

Defendants also argue that plaintiff's claim is barred by the Speech or Debate Clause of the Constitution. U.S. Const. Art I, § 6, cl. 1. Defendants argue that the Chaplains are "Officers of Congress" as defined in 2 U.S.C. § 60-1(b), and thus should be immune from suit. But, defendants themselves characterize the Clause as protecting "Members of Congress, and their aides, from being 'questioned' for any actions performed within the 'legitimate legislative sphere.'" House Chaplain's Mem. at 10 (quoting *Consumers Union of United States, Inc. v. Periodical Correspondents' Assoc.*, 515 F.2d 1341, 1350 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976)). The Chaplains' prayers occur within the physical "legislative sphere"—on the floor of Congress—but this alone is not dispositive. The purpose of the Clause is to protect "activity integral to lawmaking." *Walker v. Jones*, 733 F.2d 923, 929 (D.C. Cir.), *cert. denied*, 105 S.Ct. 512 (1984).

The practice of legislative prayer does not provide "meaningful input into . . . legislative decisionmaking." *Davis v. Passman*, 544 F.2d 865, 880 n.25 (5th Cir. 1977), *revd. on other grounds*, 571 F.2d 793 (5th Cir. 1978) (en banc), *revd.*, 442 U.S. 228 (1979). Plaintiff convincingly supports his argument as to the nonlegislative character of the Chaplains' duties by pointing out that a quorum need not be present during the Chaplains' prayers. Stipulation of Senate Exhibits and Facts at ¶ 19 (filed Dec. 19, 1984); *see* 6 C. Cannon, *Precedents of the House of Representatives* § 663 (1936) (prayer by the Chaplain "is not a matter of business, but . . . a matter of ceremony"). Moreover, plaintiff's claim challenges the "carrying out of [legislative] directions," e.g., the Chaplains' carrying out of House and Senate rules

which circumscribe their conduct, not the process of legislative speech and debate which leads to the formulations of legislative directions. *Gravel v. United States*, 408 U.S. 606, 620-21 (1972); *see Doe v. McMillan*, 412 U.S. 306 (1973); *Powell v. McCormack*, 395 U.S. 486 (1969); *Kilbourn v. Thompson*, 103 U.S. 168 (1880). As such, plaintiff's claim is not barred by the Speech or Debate Clause.

III.

A.

1.

On the merits of Count I, defendants first question plaintiff's contention that the Chaplains, by allowing guest chaplains to give the opening prayer, have created a forum for expressive activity, an exclusion from which requires First Amendment scrutiny. Defendants argue that the Supreme Court decision in *Minnesota State Board*, *supra*, bars plaintiff's claim that he was discriminatorily denied permission to open a congressional session. In *Minnesota State Board*, community college faculty members challenged the constitutionality of a Minnesota statute which required public employers to "meet and confer" only with their professional employees' designated exclusive representative. Plaintiffs argued that the employer should listen to their views, as well as those of the exclusive representative. The Court held that plaintiffs had no right of access to the "meet and confer" sessions, and that the public employer had not created a "forum" for First Amendment purposes. According to the Court:

> "[m]eet and confer" sessions are occasions for public employers, acting solely as instrumentalities of the state, to receive policy advice from their professional employees. Minnesota has simply restricted the class of persons to whom it will listen in its mak-

> ing of policy. Thus, appellees' principal claim is that they have a right to force officers of the state acting in an official policymaking capacity to listen to them in a particular formal setting. The nonpublic forum cases concern government's authority to provide assistance to certain persons in communicating with other persons who would not, as listeners, be acting for the government. As the discussion below makes clear, the claim that government is constitutionally obliged to listen to appellees involves entirely different considerations from those on which resolution of nonpublic forum cases turn.

104 S.Ct. at 1065 (footnote omitted).

It may be argued here that the Members of the House and Senate have "simply restricted the class of persons," *id.*, from whom they will receive a morning prayer. But in *Minnesota State Board*, the representative was chosen by the group of individuals as a whole to express a collective view.[2] Thus in *Minnesota State Board*, the class of persons entitled to speak, not the government, chose the one speaker. Here, Congress chooses its Chaplains and the Chaplains choose the guest chaplains. These speakers do not represent any collective American view of the proper content of prayer. Here also, the Chaplain is not speaking to the legislators in their "official policymaking capacity," *id.* at 1065, but is fulfilling the historical function of providing an opening prayer. *See* Part II, C, *infra*. Moreover, the Chaplains' prayers are published in the *Congressional Record* and compiled for public access. *See Kennickell*, *supra*, 622 F. Supp. at 1415. Thus, as well as communicating with legislators, the Chaplains speak to "other persons who would not, as listeners, be acting for the government." *Minnesota State Board*, 104 S.Ct. at 1065. Finally, the Courts in

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[2] The State Board recognized, however, "that not every instructor agrees with the official faculty view on every policy question." *Id.* at 1062.

Marsh and *Murray* found it appropriate to inquire into the constitutionality of the content of the speech given in this particular forum. Because plaintiff's claim is arguably distinct from that presented in *Minnesota State Board*, it will be reviewed under the traditional First Amendment forum analysis.

2.

The Supreme Court has recognized three different types of fora for First Amendment expressive activity. The first type of forum is a place "which by long tradition or by government fiat ha[s] been devoted to assembly and debate . . ." *Perry*, *supra*, 460 U.S. at 45. In this type of forum, "the rights of the State to limit expressive activity are sharply circumscribed." *Id.* Plaintiff does not contend that the guest chaplain program constitutes a traditional public forum. Instead, in Count I of his complaint, plaintiff argues that through the guest chaplain program, both the House and Senate Chaplains have created a limited public forum.

A limited public forum "consists of public property which the State has opened for use by the public as a place for expressive activity." 460 U.S. at 45. A limited public forum is one created "for a limited purpose such as . . . for the discussion of certain subjects." *Id.* at 46 n.7. In a limited public forum, although the government may limit access according to the designated subject matter, it cannot otherwise condition access on the content of the proposed speech unless it can demonstrate a compelling reason for doing so. *Id.* at 46.

The creation of a limited public forum depends upon government intent. Where the government has not only limited access to a forum according to an articulated purpose, but also has consistently required government permission for access, the third type of forum, a nonpublic forum, is created. *Cornelius v. NAACP Legal*

Defense and Educational Fund, Inc., 105 S.Ct. 3439, 3450-51 (1985). In a nonpublic forum:

> [c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. . . . Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, . . . or if he is not a member of the class of speakers for whose especial benefit the forum was created, . . . the Government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

105 S.Ct. at 3451.

Here, the permission of the appropriate Chaplain is required for an individual to appear as a guest chaplain either before the House or the Senate. Further, it appears that the Chaplains have consistently exercised discretion in choosing guest chaplains, most obviously by imposing the requirement that they say a prayer. Consequently, the forum created by the program is nonpublic. As such, distinctions as to guests need only be reasonable and viewpoint neutral. *Perry*, *supra*, 460 U.S. at 46.

3.

Plaintiff argues that even if the guest chaplain program constitutes a nonpublic forum, the deliberate exclusion of nontheists constitutes unconstitutional viewpoint discrimination. Defendants do not question the fact that plaintiff was excluded from the forum because he would not invoke a deity. The issue is thus whether such a basis for exclusion constitutes unconstitutional viewpoint discrimination.

The Court in *Marsh* upheld the practice of the Nebraska legislature of beginning "each of its sessions with a prayer offered by a chaplain who is chosen biennially by the Executive Board of the Legislative Council and paid out of public funds." 463 U.S. 784-85 (footnote omitted). The Court based its decision in part on the fact that "the practice of opening sessions *with prayer* has continued without interruption ever since th[e] early session of Congress." *Id.* at 788 (footnote omitted) (emphasis supplied). Moreover, the Court held that the Nebraska legislature could elect the same chaplain for 16 consecutive years without violating the Establishment Clause. The Court based this decision on evidence that the Chaplain was "acceptable to the body appointing him," *id.* at 793 (footnote omitted), and thus implicitly on the fact that if he became unacceptable, he could be removed by the legislature. The Court noted that this chaplain "was not the only *clergyman* heard by the legislature; guest *chaplains* have officiated at the request of various legislators and as substitutes during [his] absences." *Id.* (emphasis supplied). The Court thus held that the Nebraska legislature could constitutionally choose, as a body, to limit the speech in the opening of legislative sessions to payers by chaplains and clergymen for 16 consecutive years.

Here, the House and Senate have chosen the current Chaplains to open the legislative sessions. The Chaplains are required by House and Senate rules to say a prayer. Senate Rule IV; House Rule VII. The House and Senate have by these rules limited the subject matter of opening remarks to "prayer." The Supreme Court has held that a legislature may constitutionally choose to listen exclusively to prayer, as opposed to nonprayer, in the opening moments of each session. Although the choice between prayer and nonprayer appears to involve a choice between viewpoints, the Supreme Court has held that this particular forum may constitutionally be limited to prayer, and thereby sanctioned this particular viewpoint

discrimination. Thus. in so limiting the expression in the forum, the Chaplains do not engage in unconstitutional viewpoint discrimination.

The Supreme Court decision in *Marsh* was based on a "unique history," *id.* at 791,[3] and as such, must be narrowly construed to minimize its apparent conflict with Supreme Court doctrine which firmly separates government from religion. *Community for Creative Non-Violence v. Hodel*, 623 F. Supp. 528, 533-34 (D.D.C. 1985), *emergency motion for injunction pending appeal denied*, No. 85-03861 (D.C. Cir. Dec. 23, 1985) (per curiam).[4] Despite this established Supreme Court doctrine, however, no narrowness of interpretation can avoid the fact that the Supreme Court in *Marsh* held that a legislature may choose to fill a publicly-paid forum exclusively with chaplains and clergymen, and almost exclusively with a chaplain representing one particular religious denomination. This is the law. As Justice Rehnquist has stated:

> Unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower courts no matter how misguided the judges of those courts may think it to be.

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[3] *See Wallace v. Jaffree*, 105 S.Ct. 2479, 2494 & n.4 (1985) (Powell, J., concurring) ("Only once since our decision in *Lemon*, *supra*, have we addressed an Establishment Clause issue without resort to its three-pronged test. *See Marsh* . . . . *In Marsh*[,] . . . [o]ur holding was based upon the historical acceptance of the practice, that had become 'part of the fabric of our society.' ").

[4] *See Everson v. Board of Education*, 330 U.S. 1, 16 (1947), ("In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' " (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1879)); *see also Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122-23 (1982); *School District of Abington Township v. Schempp*, 374 U.S. 203, 226 (1963).

Hutto v. Davis, 454 U.S. 370, 375 (1982). Plaintiff has failed to distinguish his claim from the issues decided in *Marsh*. The accompaning Order will grant defendants' motions for summary judgment as to Count I.

B.

In Count II of plaintiff's complaint, plaintiff alleges that certain prayers offered by the Senate Chaplain overtly disparage non-theism and thus go beyond the bounds of *Marsh*. Plaintiff's argument that the Senate Chaplain's remarks go beyond the bounds of *Marsh* depends upon a caveat contained in that decision, which provides:

> [t]he content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

463 U.S. at 794-95. Plaintiff attaches as exhibits to his memorandum in support of his motion a number of the prayers which contain statements that he alleges disparage non-theism. Excerpts from these prayers provide:

> Awaken us to the reality that to govern without God is to be a godless government and a godless government soon loses its concern for human rights, minorities and all people.
>
> We are grateful for our legacy as a Nation . . . . Help us never to forget that this is fundamental to our system of values which would be nonexistent if our Founding Fathers had declared: "We hold these truths to be self-evident, that all men are descended from monkeys . . . ."
>
> Father in Heaven, in a day when Godless forces would deny and destroy human rights, help us to

see the futility in struggling to preserve them when we deny, privately and publicly, the God who gave them.

May we never ignore [the laws by which Thou dost govern the universe] without which there could be no science, no morality, no justice, nothing predictable or dependable in history.

Help us . . . to realize that the God-factor is fundamental to our system, that if we refuse to be "governed by God," we will be ruled by tyrants.

May we understand that our rights are secure only as we take God seriously.

The liberties of a nation cannot be secure when belief in God is abandoned. Help us to see the futility of the struggle to preserve liberty when faith in God is forsaken.

Deliver us, righteous God from the self-deception which makes us think we can disregard Thy law and escape judgment. We pray in the name of the Holy One. Amen.

Plaintiff's Mem., Exs. 10-13, 15-18.

Plaintiff points out, correctly, that the Establishment Clause is meant to ensure government neutrality not only among religions, but between religion and nonreligion.[5] Consistent with this philosophy, plaintiff argues,

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[5] The Supreme Court stated:

> At one time it was thought that this right [of the individual to choose his own creed] merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Mohammedism or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience pro-

the Supreme Court's statement in *Marsh* protects against "disparage[ment of] any . . . belief," *Marsh*, 463 U.S. at 795, even the belief that there is no God or nonbelief on this subject.

Defendants make the preliminary argument that this claim is precluded by the decision of our Court of Appeals in *Murray*. After being directed to show cause why their complaint should not be dismissed in light of *Marsh*, plaintiffs in *Murray* made the identical argument advanced here, that the Senate Chaplain's remarks went beyond *Marsh* because they disparged non-theism. The Court of Appeals nevertheless dismissed the action for want of a substantial constitutional question. But, one of defendants' arguments in *Murray* was that plaintiffs' new allegation went beyond the scope of the complaint and should be dismissed for that reason. Senate Chaplain's Mem. at 19 n.15. The Court of Appeals in *Murray* thus did not clearly dispose of the issue presented here.

On the merits, Count II of plaintiff's complaint raises serious constitutional concern. As the record now stands, however, ultimate disposition of this issue is also troublesome for a number of reasons. First, the Supreme Court's sanctioning of "invo[cation of] Divine guidance on a public body entrusted with making the laws," 463 U.S. at 791-92, and the Court's concomitant caveat against disparagement of other beliefs, suggest that the use of prayer by a Chaplain or a visiting Chaplain in the Congress to achieve political ends,[6] or the use of po-

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tected by the First Amendment embraces the right to select any religious faith or none at all."

Wallace, supra, 105 S.Ct. at 2488 (footnotes omitted); *Everson, supra*, 330 U.S. at 15 ("Neither [a state nor the Federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another."). *But see Wallace, supra*, 105 S.Ct. at 2509-20 (Rehnquist, J., dissenting).

[6] E.g., "to govern without God is to be a godless government and a godless government soon loses its concern for human rights, minorities and all people." Plaintiff's Mem., Ex. 10.

litical argument to achieve religious objectives,[7] may exceed the bounds of Marsh.[8] An initial comparison of the prayers cited by plaintiff and the representative prayer before the Court confirms this distinction. The prayer in *Marsh* invoked a deity and quoted scripture, but did not link religious belief to political action. Other prayers before the Supreme Court in *Marsh*, however, are not in the record in this action and should be in order to confirm or dispel this apparent distinction.

As a second concern, the Chaplain here is accountable to the Senate, a coordinate branch of government. Although separation of powers concerns do not bar plaintiff's action, this controversy may be susceptible to disposition by Senate rule or action on an appropriate petition. *See Kennickell*, *supra*, 622 F. Supp. at 1418-20. Either process would allow the Legislative Branch an opportunity to define what it considers to be acceptable "prayer." Such a positive definition of "prayer" would provide greater guidance to present and future Chaplains than would a negative declaration by this Court. Moreover, parsing particular prayers for their relative disparaging content is "sensitive," *id.* at 795, and would intimately entangle the Court with subjective evaluations of a religious nature, thereby creating exactly the climate

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[7] E.g., "Help us . . . to realize that the God-factor is fundamental to our system, that if we refuse to be 'governed by God,' we will be ruled by tyrants." Plaintiff's Mem., Ex. 15.

[8] *See Wallace*, *supra*, 105 S.Ct. at 2497 (O'Connor, J., concurring) (quoting her concurrence in *Lynch v. Donnelly*, 104 S.Ct. 1355, 1366 (1984)) ("[T]he religious liberty protected by the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religious practice is invalid under this approach because it 'sends the message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'").

for religious tension that the Establishment Clause is intended to prevent. *See Lemon, supra*, 403 U.S. at 612-13. Resolution of this controversy without such entanglement is therefore to be preferred. The Court thus far, however, has received no indication that the Senate is willing to consider the issue. *See Kennickell, supra*, 622 F. Supp. at 1418-20.

Finally, plaintiff's proposed relief is troublesome in that he seeks a prior restraint—an injunction against all present and future Chaplains—as a remedy for the alleged First Amendment violation. But the remedy itself may pose First Amendment concern. *See Organization For A Better Austin v. Keefe*, 402 U.S. 415 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931). For this reason also, a positive definition of "prayer," as opposed to a negative restraint, would most effectively resolve the present action.

Accordingly, it is appropriate to hear further argument on Count II. The accompanying Order will set oral argument for a date certain, at which the parties should be prepared to address the above concerns, particularly the prospects for relief by rule or petition. *Compare Kennickell, supra*, 622 F. Supp. at 1420 *with Gregg v. Barrett*, 771 F.2d 539, 543-46 (D.C. Cir. 1985). The Order will also direct the parties to file on the record in this action all prayers before the Supreme Court in *Marsh*.

/s/ Louis F. Oberdorfer
United States District Judge

Date: March 10, 1986

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-2919

DR. PAUL KURTZ,

Plaintiff,

v.

JAMES A. BAKER, SECRETARY OF THE TREASURY, *et al.*,

Defendants.

[Filed Aug. 22, 1986]

MEMORANDUM

Plaintiff, Dr. Paul Kurtz, is a professor of philosophy and a secular humanist. Defendants are the Secretary of the Treasury, the Treasurer of the United States, the Chaplain of the House and the Chaplain of the Senate.

Plaintiff brings this suit requesting a permanent injunction to restrain all present and future chaplains of the United States Senate and House of Representatives, while acting in their official capacity, from disparaging the beliefs of nontheists, and a declaration that the making of such remarks by a Senate or House chaplain is unconstitutional. In the alternative, plaintiff seeks the termination of federal funding of the chaplaincies.

This case, now before this Court a second time, is in a somewhat unusual posture. To understand its posture, it is necessary to review the events leading to the present.

The controversy began in February 1984, when plaintiff wrote to the Senate and House Chaplains, requesting permission to participate in the informal "guest chaplain program," whereby speakers were occasionally invited to stand in for the chaplain and give the opening remarks and prayer before members of Congress. Plaintiff stated in his application letter that his remarks would not invoke a deity. Both Chaplains rejected plaintiff's request, stating as one of their reasons that plaintiff would not offer a prayer during his remarks. That summer, plaintiffs also had occasion to review some of the prayers of the Senate Chaplain. Plaintiff discovered several prayers in which the Senate Chaplain had, in his opening prayers before the Senate, allegedly disparaged the beliefs of nontheists.

Complaining about his exclusion from the guest chaplain program, and the content of some of the Senate Chaplain's prayers, plaintiff filed suit on September 19, 1984. Count I alleged that the guest chaplain program discriminatorily excludes nontheists in violation of the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment, and the Due Process Clause of the Fifth Amendment, of the United States Constitution. Plaintiff sought to enjoin the allegedly discriminatory practice and a declaration that the practice is unconstitutional. In the alternative, plaintiff sought termination of federal funding of the House and Senate chaplaincies. Count I was dismissed by Order filed March 11, 1986. *Kurtz v. Baker*, 630 F. Supp. 850 (D.D.C. 1986).

In Count II, plaintiff raised the claim now at issue. Plaintiff alleged that the Senate Chaplain "has routinely used his opening remarks as a vehicle for disparaging the beliefs of non-theists . . ." Complaint at ¶ 44 (filed Sept. 19, 1984). Plaintiff alleged that the Senate Chaplain's remarks violate the Establishment Clause of the First Amendment, and sought the same relief requested in Count I.

In turn, defendants challenged plaintiff's right to bring the suit, arguing that plaintiff lacked standing to raise his claims, that his challenges presented nonjusticiable political questions, and that his action was barred by the Speech and Debate Clause of the Constitution, U.S. Const. Art. I, § 6, cl. 1. Each of these jurisdictional challenges was rejected for reasons stated fully in 630 F. Supp. 850. Defendants also moved for summary judgment on Count I, contending that the Supreme Court opinion in *Marsh v. Chambers*, 463 U.S. 783 (1983), foreclosed further judicial inquiry into the constitutionality of the guest chaplain program, and compelled a decision in defendants' favor.

Defendants' motion for summary judgment on Count I was granted. Resolution of Count II, however, in which plaintiff challenged the allegedly disparaging prayers of the Senate Chaplain, was postponed to permit further briefing. While *Marsh v. Chambers* spoke broadly to the constitutionality of the legislative chaplaincy, the Supreme Court failed to address what limits, if any, the Constitution places on the content of the chaplain's prayers. But the Court's opinion, generally upholding the constitutionality of legislative chaplaincies, does contain a caveat from which one might fairly infer that the Senate Chaplain may not use his official government position to disparage the beliefs of nontheists and that judges would have concern and jurisdiction in such a case. That caveat states:

> The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

463 U.S. at 794-95.

To demonstrate the extent and nature of the Senate Chaplain's disparagement, plaintiff attached as exhibits several excerpts from prayers spoken by the Chaplain. These excerpts are more fully set out in this Court's earlier opinion, 630 F. Supp. at 860. Three examples follow:

> Awaken us to the reality that to govern without God is to be a godless government and a godless government soon loses its concern for human rights, minorities and all people.
>
> * * * *
>
> We are grateful for our legacy as a Nation. . . . Help us never to forget that this is fundamental to our system of values which would be nonexistent if our Founding Fathers had declared: "We hold these truths to be self-evident, that all men are descended from monkeys . . . ."
>
> * * * *
>
> Help us . . . to realize that the God-factor is fundamental to our system, that if we refuse to be "governed by God," we will be ruled by tyrants.

Noting that the Establishment Clause is meant to ensure government neutrality not only among religions, but between religion and nonreligion, the Court remarked that these prayers raise "serious constitutional concern," 630 F. Supp. at 861, but postponed resolution of Count II because the then record did not permit adequate consideration of material issues, including the implications of the caveat in *Marsh*, and the prospects of Congressional clarification of the proper content of the Senate Chaplain's prayers. Since that time, there have been several intervening events of importance.

At a March 26, 1986 hearing, Senate Legal Counsel (and counsel for the Senate Chaplain) indicated that he had brought this matter to the attention of Senator Charles M. Mathias, Jr., Chairman of the Senate Com-

mittee on Rules and Administration, and discussed with him "whether . . . consideration of a Senate rule affirmatively defining prayer would be a fruitful and proper undertaking." [1] That discussion failed to resolve the matter. Explaining the Senate's hesitancy to act, counsel stated that "[t]he difficulty with a formal rule is that it would embroil the Senate" in a debate on "the meaning of prayer and the appropriate parameters of prayer . . . . It is an undertaking which has never been done and just the thought of it elicits great concern that the very kind of divisiveness that the First Amendment seeks to avoid would be the inevitable product of such a debate." Because of the difficulty and sensitivity of defining the appropriate parameters of prayer, counsel reported to the Court that the prospects for relief by rule or petition are not good. A preferable way to resolve this dispute, Senate counsel proposed, would be to have Senate Chaplain Reverend Richard C. Halverson and Dr. Kurtz sit down together and deal directly. Referring to Reverend Halverson's eagerness not to offend, counsel stated: "It doesn't take a rule and it doesn't take a policy for people to adjust to criticism."

Plaintiff explained, however, that the controversy is not a personal one between Reverend Halverson and Dr. Kurtz. Plaintiff seeks to guard against disparagement not only by Reverend Halverson, but by future chaplains as well, and requests some form of relief that is more certain and durable than the memory of a private meeting with the present Chaplain. Plaintiff also contends that Senate guidance to the Chaplain concerning the proper content of prayer would not embroil it in divisive debate, or affront First Amendment concerns. Plaintiff points to the events of 1969. In that year, a special bipartisan Committee on the Status of the Senate Chaplain completed a study to determine policy for the

[1] Quotations are taken from a tape recording of the hearing. The hearing has not yet been officially transcribed.

Office of the Senate Chaplain. Concerned that the Chaplain refrain from using his forum to engage in political expression, Senators Mike Mansfield and Everett Dirksen, acting as majority and minority leaders of the United States Senate and speaking on behalf of the Committee, wrote to Senate Chaplain Edward L.R. Elson and cautioned him against using his prayer opportunity for political comment.[2] This incident demonstrates, says plaintiff, recognition by the Senate of the necessity and appropriateness of Senate guidance, even in matters touching the content of prayer.

Even though Senate guidance is appropriate, plaintiff argues, Senate involvement is not necessary to resolution of this case. The Office of the Chaplain can take steps on its own. At the March 26 hearing, plaintiff explained:

> In the record in this case already there is an official release from the office of the Senate Chaplain, talking about what the chaplain does, and the guest chaplaincy, and what have you. It seems to me that one way to dispose of this case . . . is if in future releases similar to that there would be an indication that the prayer opportunity is not used to disparage the beliefs of others, including the beliefs of the non-religious. That would be one sentence inserted in this release from the Office of the Senate Chaplain. I don't think that could be plausibly characterized as any kind of intrusion into [the Senate's affairs].

Following the status conference in March, an exchange of letters occurred between Reverend Halverson and Dr.

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[2] The letter states in part: "The Chaplain is responsible for avoidance in his own prayers, and in the prayers of guest Chaplains, of the injection of political partisanship and personal points of view respecting contemporary national and international issues." Supplement to Senate Exhibits, Senate Ex. 6 (letter of February 7, 1969).

Kurtz. This correspondence, set out in the appendix, is composed of two sets of exchanges from March 27 to May 8, 1986. Reverend Halverson initiated the exchange. The correspondence suggests that both men have grappled with the other's concerns with sympathy and in good faith. Reverend Halverson, in his letter dated April 24, states that "[d]isparagement was the farthest thing from my mind . . . . I not only regretted that disparagement had been communicated, but have tried subsequently to guard against such a possibility."

On May 1, 1986, after Reverend Halverson's second letter, Defendant Senate Chaplain ("Defendant") filed a renewed motion to dismiss, requesting two forms of relief. Memorandum of Defendant Senate Chaplain in Support of Renewed Motion to Dismiss (filed May 1, 1986) ("Defendant's Renewed Motion"). First, defendant requests that plaintiff's suit be dismissed because "the controversy has now become too attenuated to justify the extraordinary relief sought through equity's intervention." Defendant's Renewed Motion at 2 (quoting *De Arellano v. Weinberger*, 788 F.2d 762, 764 (D.C. Cir. 1986) (en banc) (per curiam). Defendant also requests that, upon dismissing the suit, the Court vacate its prior jurisdiction holdings in Count II. Defendant's Renewed Motion at 7. *See Kurtz v. Baker*, 630 F. Supp. 850 (D.D.C. 1986). Argument on defendant's renewed motion was held on June 18, 1986. For reasons set out below, defendant's motion to dismiss and motion to vacate are granted.

I.

Defendant Senate Chaplain contends that the exchange of letters between himself and Dr. Kurtz, his enlightenment, and his intent "to guard against" making further disparaging remarks, render the present dispute too attenuated to warrant exercise of the Court's extraordinary powers of equity. Defendant cites *Community for Creative Non-Violence v. Hess*, 745 F.2d 697 (D.C. Cir. 1984) in support.

In *Hess*, plaintiffs brought suit asserting that District of Columbia Superior Court judges violated the Free Exercise Clause by requiring everyone to stand when a judge enters and leaves the courtroom. Unbeknownst to the judges, such displays of respect were contrary to the plaintiffs' religious convictions. Upon being informed that the judges would accommodate the religious beliefs of plaintiffs, the District Court dismissed the suit and the Court of Appeals affirmed, the latter court explaining that even though the case was not technically moot, "the wholesome considerations underlying the Article III case-or-controversy requirement" counsel against resolution of constitutional issues if avoidable. 745 F.2d at 700 (footnote omitted). The Court stated: "[T]he likelihood of recurrent confrontations . . . is much too small to warrant decision of the issue. . . ." 745 F.2d at 701.

Defendant, drawing parallels to *Hess*, explains that "[a]s 'the judges [in *Hess*] have volunteered to reconcile their needs for respect and order in the courtroom with [the *Hess* plaintiffs'] religious dictates,' so Dr. Halverson has volunteered to Dr. Kurtz that he understands Dr. Kurtz's concerns and that he intends to guard against the possibility that disparagement might be perceived in his prayers." Defendant's Renewed Motion at 6-7. In these circumstances, defendant concludes, injunctive or declaratory relief is unwarranted.

Withholding extraordinary relief is even more appropriate here than in *Hess*, defendant argues, because of the existence of the letters, which embody the Senate Chaplain's promise to guard against disparagement. Written on official stationary, Reverend Halverson's letters will be preserved, along with the letters of Dr. Kurtz, in the legislative record division of the National Archives, pursuant to 2 U.S.C. § 288g(b). Also, Reverend Halverson, through counsel, has promised to maintain a copy of the correspondence in the office of the

Senate Chaplain so that it will be available to his successor and to future chaplains.[3]

In response, plaintiff emphasizes the Senate Chaplain's unwillingness to adopt a formal policy against disparagement. "It would have been easy enough for the office of the Senate Chaplain to adopt a policy to the effect that 'the Senate Chaplain is to avoid remarks which advance or disparage any particular faith or belief.' Such a policy statement," plaintiff says, "could have been embodied in the release distributed by the Senate Chaplain's office . . . without causing the slightest embarrassment to that office. The refusal to take even this simple step, belies the contention that [future disparagement] 'is much too small to warrant decision of the issue.'" Plaintiff's Response to the Senate Chaplain's Renewed Motion to Dismiss ("Plaintiff's Response"), at 3-4 (filed April 12, 1986) (quoting *Hess*, 745 F.2d at 701). Plaintiff concludes, "If the institution of the Senate Chaplaincy is unable or not disposed to commit itself to following a constitutionally sound course, then there is no alternative but to ask the Court's assistance." Plaintiff's Response at 4 (footnote omitted).

Though constitutional concerns persist with respect to defendant's official remarks, the Court is persuaded that the balance of considerations counsel against resolution of the constitutional issues at this time. Many factors inform this conclusion, not least among which is the preference to avoid resolution of constitutional issues when fairly possible. *See, e.g., Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

Reverend Halverson's letters indicate his sensitivity to Dr. Kurtz's objections and his desire to avoid disparaging the beliefs of nonthesists in the future. While this

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[3] Statement of counsel for Senate Chaplain, June 18, 1986 hearing. This hearing has not yet been officially transcribed.

correspondence does not rise to the level of a "rule," its importance should not be minimized. Reverend Halverson's letters, written by him as an officer of the United States Senate, give every indication of being the product of sincere and deliberate thought, and offer hope that Dr. Kurtz will find nothing in Reverend Halverson's future prayers with which to take exception. In this light, it is significant that plaintiff has not brought to the Court's attention any official remarks by Reverend Halverson that could be deemed disparaging in the several months subsequent to the filing of this suit. There is no reason to believe that Reverend Halverson's statement of intent, and his subsequent behavior, are for purposes of litigation only. *See Commodity Futures Trading Commn. v. Board of Trade*, 701 F.2d 653, 656 (7th Cir. 1983).

Plaintiff has conceded that this suit would warrant dismissal as too attenuated if the Senate Chaplain placed a copy of their correspondence in a certain file—specifically, the file containing Senator Mansfiield's and Dirksen's 1969 letter to Reverend Elson. Reverend Halverson has refused to accede to this request as a way of settling the case, asserting that the independence of his office would be sacrificed by accession to plaintiff's demand. As stated above, however, the Reverend has given his "personal commitment that he will maintain [the correspondence for the important audience to follow him" in the Chaplain's office. (Statement of counsel for Senate Chaplain, June 18, 1986 hearing.)

Wherever the correspondence is placed, it seems likely that knowledge of the correspondence will remain in the public domain. Dr. Kurtz's letters have attracted the considered attention of the Senate Chaplain and of the Senate administrative staff. They are now on file in this case and set out in the appendix to this opinion. Insofar as the dispute boils down to, and the continuation of this suit hinges on, where the correspondence will be stored,

the litigation's "stakes" seem hardly significant enough to warrant this Court to venture upon the sensitive matter of parsing the words of prayer. *See Marsh*, 463 U.S. at 795.

Dismissal of this suit is also favored by the fact that it is not clear that judicial intervention is required. Plaintiff has failed entirely to seek relief through legislative channels. He has failed to ask his congressman to get the letters placed in the desired file, or read into the Congressional Record. His failure to exhaust other avenues of relief argues against judicial intervention.

In addition, there are separation of power concerns, and "[w]hile the separation-of-powers concerns presented by this case do not deprive the court of power to adjudicate under Article III . . . they may affect the proper exercise of judicial discretion to grant or withhold declaratory relief for the stated claim." *Moore v. U.S. House of Representatives*, 733 F.2d 946, 954 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 779 (1985). There is balancing to be done, and grants and denials of relief are properly influenced by many considerations, some of which bear only a tenuous relationship to the "merits" of the legal claim, defined in the narrowest sense.

In these circumstances, and in light of these considerations, even though the case is not constitutionally moot, it seems appropriate to withhold the equitable relief requested by plaintiff. *See, e.g., United States v. W.T. Grant Co.*, 345 U.S. 629 (1953); *Chamber of Commerce of the United States v. United States Dept. of Energy*, 627 F.2d 289 (D.C. Cir. 1980) (per curiam); *Kurtz v. Kennickell*, 622 F. Supp. 1414 (D.D.C. 1985). Since no relief will be granted, defendants's renewed motion to dismiss is granted.

II.

Defendant, relying on *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), asks this Court to vacate its

prior jurisdictional holdings in Count II. *See Kurtz*, 630 F. Supp. 850. *Munsingwear*, says defendant, established a judicial policy of vacating preliminary holdings where the case giving rise to such holdings becomes moot prior to its final resolution. This policy "prevent[s] a judgment, unreviewable because of mootness, from spawning any legal consequences." *Munsingwear*, 340 U.S. at 41.

In *Munsingwear*, the United States brought suit for injunctive and money relief for alleged violations by defendant of maximum price regulations. By agreement, the claim for injunctive relief proceeded first, while the claim for damages was held in abeyance. At trial, the District Court denied injunctive relief, finding that defendant's prices for its commodities complied with the regulations. The United States appealed, but the applicable price regulations were rescinded while the case was on appeal. Because there was no longer any basis for issuing injunctive relief, the Court of Appeals dismissed the appeal as moot. The problem arose when the United States then sought to pursue its claim of damages. The defendant argued that the action was barred by res judicata, pointing to the unreversed judgment of the District Court. The District Court and the Court of Appeals agreed. A divided Supreme Court affirmed. To plaintiff's argument that application of res judicata would be improper where plaintiff was denied appellate review of the district court's decision because of intervening mootness, the Supreme Court replied that this hardship was preventable. The plaintiff, the Court said, should have requested the Court of Appeals to vacate the judgment below prior to dismissing the appeal as moot.

Most important to the present matter, the Court reiterated that it is the duty of an appellate court to vacate prior holdings where the underlying case is dismissed as moot. This prevents a decision, unreviewable because of mootness, from having preclusive effect in subsequent

proceedings. Though the present case is not constitutionally moot, defendant argues that the same principles require vacation of the prior jurisdictional holdings in Count II, presumably because they too are unreviewable.

Plaintiff argues in turn that the *Munsingwear* principle has no application outside of cases that are "truly moot." Pointing to *Moore v. U.S. House of Representatives, supra*, plaintiff asserts that when courts deny relief for prudential reasons, they do not vacate rulings on other issues, including issues of justiciability. *Moore* involved suit by members of the House challenging the constitutionality of the Tax Equity and Fiscal Responsibility Act. Plaintiffs argued that the act was unconstitutional because it originated in the Senate, in contravention of the "origination clause" of the Constitution, U.S. Const. art I, § 7, cl. 2, which requires that "[a]ll Bills for raising revenue shall originate in the House of Representatives . . . ." The District Court granted defendants' motions to dismiss, finding that plaintiffs lacked standing to bring suit, and that, in any case, equitable considerations compelled dismissal. 553 F. Supp. 267 (D.D.C. 1982). On appeal, plaintiffs argued that the district court erred in its standing analysis. The Court of Appeals agreed and, after full discussion, held that plaintiffs did in fact have standing to bring the suit. But the Court of Appeals affirmed the lower court's dismissal on equitable grounds, relying principally on its reluctance to intervene in a dispute among members of Congress. Yet despite the dismissal and the presence of divisive jurisdictional issues, the Court of Appeals did not vacate its jurisdictional holding, and its "standing" decision has been relied upon subsequently in this Circuit. *See, e.g., Barnes v. Kline*, 759 F.2d 21, 26, 28 (D.C. Cir. 1985).

Moore, however, is not on all fours with the present case. Dismissal in *Moore* was premised on the belief that the identity of the parties made the suit inappropri-

ate for judicial intervention, and the decision contains no suggestion that future events might revive the case and render it fit for decision. Thus, dismissal did not implicate res judicata concerns. On the other hand, future events could revive the present controversy, and, by doing so, eliminate the grounds on which the present decision to dismiss rests. This action, therefore, may present res judicata concerns that were not present in *Moore*.

Insofar as the prior jurisdictional holdings in this case are res judicata, the principles underlying *Munsingwear* argue in favor of vacating those holdings. There is language in several opinions which suggests that jurisdictional holdings may have res judicata effect in subsequent proceedings. *See, e.g., Durfee v. Duke*, 375 U.S. 106, 111-113 (1963); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 377 (1940); *Swift & Co. v. United States*, 276 U.S. 311 (1928); *Smith v. Alleghany Corp.*, 394 F.2d 381, 389 (2d Cir.), *cert. denied*, 393 U.S. 939 (1968); *Cutler v. Hayes*, 549 F. Supp. 1341, 1343 (D.D.C. 1982).

On the other hand, the jurisdictional holdings in this case do not create the same danger as the decision on the merits in *Munsingwear*. For a court has a duty constantly to review its jurisdiction and must dismiss a case where jurisdiction is found not to exist. *Insurance Corporation of Ireland v. Compagnie Des Bauxites*, 456 U.S. 694, 702 (1982); *Safir v. Dole*, 718 F.2d 475, 481 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1206 (1984); *Potomac Passengers Assn v. Chesapeake & Ohio Railway Co.*, 520 F.2d 91, 95 (D.C. Cir. 1975). A court's obligation to deny its jurisdiction over nonjusticiable, political questions is no less important.

If indeed the parties here could be foreclosed from challenging Count II's jurisdictional holdings, it is unlikely that they would be prejudiced thereby. A court will consider the matter on its own motion. Exercising re-

straint over nonjusticiable political questions going to the internal operations of the United States Congress may be of greater importance to the court itself than to the parties before it. Furthermore, the existence of a colorable political question in this case is not likely to go undetected. Under these circumstances, it is apparent that this Court's jurisdictional holdings would not prevent it or any other court from considering anew the justiciability of plaintiff's claims. There is thus little threat that the holdings here would pose the kind of danger present in *Munsingwear*.[4]

Nevertheless, while *Munsingwear* may be distinguishable, it is appropriate under the facts of this case to follow *Munsingwear's* lead and to vacate the jurisdictional holdings in Count II of the earlier opinion. This controversy has become too attenuated to warrant judicial intervention. Reverend Halverson has committed to Dr. Kurtz that he will guard against any suggestion of disparagement. Counsel for the Senate has reported that commitment publicly. In the circumstances, it would be inappropriate to assume that there is any risk that Reverend Halverson or his successors will use, or that the Senate would permit him or them to use, the prayer opportunity in the future to disparage the beliefs of nontheists. Because it is so unlikely that future events will revive this controversy, there is no reason to preserve the jurisdictional holdings in anticipation of that day. Therefore, however slightly *Munsingwear* tips the balance, its influence is sufficient reason to vacate the jurisdictional holdings.

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[4] An exception to the *Munsingwear* doctrine is recognized where the parties themselves are responsible for the intervening mootness. *See Ringsby Truck Lines v. Western Conf. of Teamsters*, 686 F.2d 720, 721 (9th Cir. 1982); *Cover v. Schwartz*, 133 F.2d 541, 546-47 (2d Cir.), *cert. denied*, 319 U.S. 748 (1942). This is another ground on which *Munsingwear* could be distinguished from the present case.

If, contrary to expectation, this or a similar controversy does revive, the judgment here vacated will have virtually the same precedential value as it would have had if it remained intact but unreviewed and unratified by an appellate court. As Justice Powell noted,

> Although a decision vacating a judgment necessarily prevents the opinion of the lower court from being the law of the case, the expressions of the court below on the merits, if not reversed, will continue to have precedential weight and, until contrary authority is decided, are likely to be viewed as persuasive authority if not the governing law of the . . . Circuit.

County of Los Angeles v. Davis, 440 U.S. 625, 646 n.10 (1979) (Powell, J., dissenting) (citations omitted).

An accompanying order will therefore dismiss the complaint and vacate the preliminary holdings under Count II of the Order filed March 11, 1986.

/s/ Louis F. Oberdorfer
United States District Judge

Date: August 22, 1986

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5660

PAUL KURTZ, DR.,
Appellant

v.

JAMES A. BAKER, SECRETARY OF THE TREASURY, *et al.*

[Filed Sept. 18, 1987]

Appeal from the United States District Court
for the District of Columbia

Before: RUTH B. GINSBURG, BUCKLEY, and D.H. GINSBURG, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby vacated and this case is remanded, in

accordance with the Opinion for the Court filed herein this date.

Per Curiam

For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: September 18, 1987

Opinion for the Court filed by Circuit Judge Buckley.

Opinion filed by Circuit Judge Ruth B. Ginsburg, dissenting from the court's standing disposition.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5660

DR. PAUL KURTZ,
Appellant

v.

JAMES A. BAKER, SECRETARY OF THE TREASURY, *et al.*

Filed Nov. 25, 1987

Before: RUTH B. GINSBURG, BUCKLEY and D.H. GINSBURG, *Circuit Judges*

ORDER

Upon consideration of appellant's petition for rehearing, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5660

DR. PAUL KURTZ,

Appellant

v.

JAMES A. BAKER, SECRETARY OF THE TREASURY, *et al.*

[Filed Nov. 25, 1987]

Before: WALD, *Chief Judge*; ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, BORK, STARR, SILBERMAN, BUCKLEY, WILLIAMS, D. H. GINSBURG and SENTELLE, *Circuit Judges*.

ORDER

Appellant's suggestion for rehearing *en banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX F

BACKGROUND AND ORGANIZATION OF THE OFFICE OF THE CHAPLAIN OF THE UNITED STATES SENATE

[OFFICIAL RELEASE FROM CHAPLAIN'S OFFICE]

The sessions of the Continental Congress were opened regularly with prayer and what has become to be known as "the first prayer in Congress" was offered by the Reverend Jacob Duché on September 7, 1774, two years before the Declaration of Independence. After the War for Independence, our Founding Fathers had prayers when they were meeting to frame the Constitution for this new Nation and the result was the greatest document of its kind that was ever written. When the Constitution was adopted and the first Congress convened in 1789 to organize under this plan, among the first Officers elected were Chaplains of the Senate and House of Representatives.

The first Chaplain of the Senate, elected April 25, 1789, was the Right Reverend Samuel Provoost, D.D. and the first Chaplain of the House of Representatives, elected May 1, 1789 was the Reverend William Linn. Subsequently, ninety-two clergymen have served as Chaplain of the two bodies, representing ten different denominations.

During the early years, the duties of the Chaplain centered primarily on the preparation and delivery of the convening prayers. The Chaplains were ministers of churches in the Washington area in addition to their duties as Chaplain. As these duties increased, the Chaplains resigned their pastorates upon election by the Congress to devote more time to the position and an office was provided so that the Chaplain could be readily available to Members of Congress and their staffs, most of whom were from areas away from Washington.

The most conspicuous aspect of the Chaplain's duties is his participation in the daily prayer, given at the opening of the Senate. The Chaplain also arranges for Guest Chaplains to participate in this traditional event, thus giving wide representation to the many denominations in our country. The Chaplain provides pastoral services to Members and staffs—weddings, funerals, invocations, and ceremonies, and serves as a representative at public functions. He also speaks at assemblies and churches, and coordinates activities with various religious groups. He serves as a counselor to Members of Congress and their staffs. The Chaplains are responsible for the use of the Prayer Room in the Capitol and provides information on ecclesiastical procedures and practices to the Congress.

The Chaplain of the Senate is one of the five Officers of the Senate and is elected by the Senate upon nomination of the majority part in caucus with the consent of the minority party. He serves for a Congress (two years) and is subject to re-election.

The present Senate Chaplain, Dr. Richard C. Halverson is a native of North Dakota, a graduate of Wheaton College and Princeton Theological Seminary. He has been awarded honorary doctoral degrees by Wheaton and Gordon Colleges.

He has served churches in Kansas City, Missouri, Coalinga, California and Hollywood, California with his last pastorate being the Fourth Presbyterian Church in Bethesda, Maryland for twenty-two and a half years.

Dr. Halverson was sworn in as Chaplain of the Senate February 2, 1981.

No. 87-1581

In the Supreme Court of the United States

OCTOBER TERM, 1987

DR. PAUL KURTZ, PETITIONER

v.

JAMES A. BAKER, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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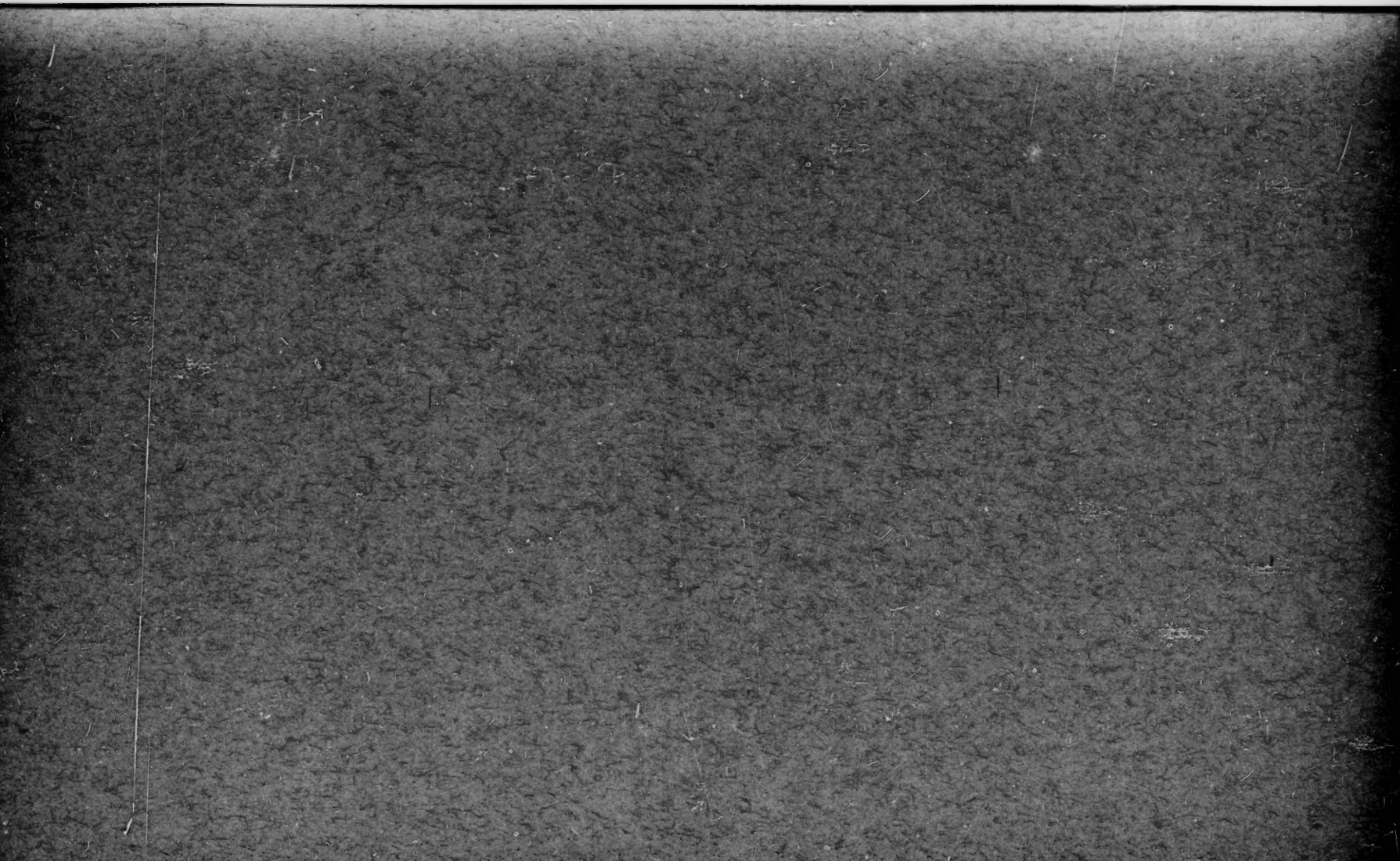

QUESTION PRESENTED

Whether petitioner, a secular humanist who applied to the House and Senate Chaplains for an opportunity to participate in the opening ceremonies as a guest chaplain, had standing to challenge the Chaplains' denial of permission to address the Congress.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and rules:

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1581

DR. PAUL KURTZ, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 829 F.2d 1133. The opinion of the district court (Pet. App. 40a-61a) from which appeal was taken is reported at 630 F. Supp. 850.[1]

JURISDICTION

The judgment of the court of appeals (Pet. App. 78a-79a) was entered on September 18, 1987. The petition for rehearing and rehearing en banc was denied on November 25, 1987 (Pet. App. 80a-81a). On February 12, 1988, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 24, 1988, and the petition was filed on March 23, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] A related opinion of the district court (Pet. App. 62a-77a) from which no appeal was taken (Pet. 6 n.5) is reported at 644 F. Supp. 613.

STATEMENT

1. On February 13, 1984, petitioner, a professor of philosophy and advocate of secular humanism, wrote to the Reverend Richard Halverson, Chaplain of the Senate, requesting " 'the opportunity to appear as a guest speaker and to open a daily session * * * with a short statement in which [he] would remind the [members of the Senate and the House] of their moral responsibilities.' " He advised Reverend Halverson that " '[a]s a secular humanist, [he] would not, of course, invoke any deity during [his] remarks,' " but suggested that his comments " 'would otherwise fall within the traditional format.' " Petitioner further proposed that " '[i]f for some reason you believe it is necessary to open the session with the invocation of a deity,' " petitioner " 'would have no objection to sharing the podium' " with Reverend Halverson. Petitioner sent a similar letter to the Chaplain of the House of Representatives, Reverend James Ford. Pet. App. 4a (citation omitted).

Two weeks later, Reverend Halverson responded to petitioner's letter, advising him that as Chaplain his " 'policy has been to invite those who are sponsored by a Senator' " (Pet. App. 3a (citation omitted)). Petitioner thereafter wrote to Senators Moynihan, Weicker, D'Amato, Goldwater, and Hatfield to seek sponsorship, but without success (*id.* at 4a). Only Senator Hatfield's office replied, and his Chief Legislative Assistant advised petitioner that (*ibid.*; C.A. App. 42):

> Senate rules preclude the possibility of non-Senators making remarks on the Senate floor. The opening of each Senate session * * * consists of a prayer by either the Chaplain or a guest minister. There is no provision or desire for lectures from whatever source. * * * [T]he intent of the time of prayer is to acknowledge our dependence upon the transcendent Creator.

The letter further stated that the Senator had a backlog of requests for the " 'guest pastor' slots," and said that "it would be impossible for Senator Hatfield to use one of his rare opportunities to present a guest pastor for someone who [*sic*] he does not know and who cannot out of conviction abide by the spirit of the rules of the Senate" (Pet. App. 4a; C.A. App. 42).

After failing to obtain a senatorial sponsor, on August 30, 1984, petitioner renewed his request to Reverend Halverson that he be invited as a "guest speaker." Reverend Halverson responded on September 7, again denying petitioner's request. He explained that as Chaplain he was allowed to invite " 'two guests per month to open the Senate with prayer,' " and that his privileges did not include " 'inviting someone to speak, however briefly.' " He also noted that since only Senators were allowed to speak in the Senate, any exception would have to be made by the Senate itself. Pet. App. 3a (citation omitted).

On March 26, 1984, Reverend Ford denied petitioner's request to appear as a guest speaker before the House of Representatives. He explained that the rules of the House provide for opening the session only with prayer and that it was " 'therefore impossible, pursuant to the rules of the House, for [him] to invite [petitioner] [to] be * * * a guest speaker.' " Petitioner made a second request of Reverend Ford on April 6, 1984, but Ford replied that " '[t]he chaplain cannot yield to another person for a statement.' " Petitioner then proposed that he and Reverend Ford " 'deliver a truly joint opening by alternating the lines of [their] texts.' " Reverend Ford did not respond to this final suggestion. Pet. App. 5a (citations omitted).

2. On September 19, 1984, petitioner filed an action in the United States District Court for the District of Columbia, naming as defendants Reverend Halverson; Reverend

Ford; the Secretary of the Treasury, James Baker; and the Treasurer of the United States, Katherine Ortega. The complaint contained two counts. In Count One, petitioner alleged that the exclusion of non-theists from the guest chaplain program in Congress constituted content-based discrimination and therefore violated the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment, and the equal protection component of the Due Process Clause of the Fifth Amendment. In Count Two, petitioner alleged that Reverend Halverson had made disparaging remarks about non-theists, so that funding of the Chapain's office was a violation of the Establishment Clause. Pet. App. 5a-6a.

On March 11, 1986, the district court granted summary judgment against petitioner on Count One of the complaint (Pet. App. 40a-61a). The court first held that petitioner's claims were not barred by the standing requirements of Article III, the doctrine of justiciability, or the Speech or Debate Clause, U.S. Const. Art. I, § 6, Cl. 1 (Pet. App. 46a-51a). Turning to the merits, the court found that the guest chaplain program constituted a "non-public forum," in that "the government has not only limited access to [the] forum according to an articulated purpose, but also has consistently required government permission for access" (*id.* at 53a). As a non-public forum, the court noted (*id.* at 54a), "distinctions as to guests need only be reasonable and viewpoint neutral." The court held that the chaplain program met that standard of reasonableness. Relying on *Marsh* v. *Chambers,* 463 U.S. 783 (1983), the court explained (Pet. App. 55a) that "a legislature may constitutionally choose to listen exclusively to prayer, as opposed to nonprayer, in the opening moments of each session." The court concluded (*id.* at 56a) that "in so limiting the expression in the forum, the

Chaplains do not engage in unconstitutional viewpoint discrimination."[2]

3. Considering petitioner's appeal of the dismissal of Count One, the court of appeals vacated the judgment for want of standing, and remanded with instructions to dismiss the complaint (Pet. App. 1a-39a). The court first found that most of petitioner's asserted bases for standing failed to satisfy the Article III requirement that a plaintiff " 'allege a distinct and palpable injury to himself' " (*id.* at 11a).[3] In the court's view, petitioner satisfied that standard only to the extent that he alleged that he had been precluded from serving as a guest chaplain. The court also held (*id.* at 16a-22a) that petitioner had failed to show that his exclusion from the chaplain program was "fairly traceable" to the actions of the Chaplains or the Executive Branch defendants. In particular, petitioner had not alleged that either house had "granted its chaplain discretionary authority such that, with the chaplain's assent, there would have been a 'substantial probability' of [petitioner's] addressing either house of Congress" (*id.* at 19a). Even if petitioner had so alleged, "such an allegation could not be seriously entertained" since "the opportunity to address either house is a privilege rarely extended to outsiders, and then only with the approval of the members of the respec-

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[2] Thereafter, in a separate decision relying on subsequent correspondence between Reverend Halverson and petitioner, and invoking separation of powers concerns, the district court dismissed Count Two and vacated the preliminary holdings in the earlier decision to the extent they concerned Count Two of the complaint (Pet. App. 62a-77a). Petitioner did not appeal this decision (Pet. 6 n.5).

[3] In particular, the court rejected (Pet. App. 12a-15a) petitioner's assertion of federal taxpayer standing, finding that his claim did not satisfy the prerequisites of *Flast* v. *Cohen*, 392 U.S. 83 (1968). It also held that petitioner lacked standing insofar as he was alleging a stigmatic injury to non-believers (Pet. App. 15a-16a).

tive houses" (*ibid.*). And in any event, the court explained (*ibid.*), the "strong endorsement of congressional prayer" by members of the Congress "undermine[s] any contention that the leadership of either house had authorized the chaplains to transform the period reserved for prayer into what [petitioner] has styled an 'opening ceremony' in which 'non-theistic' remarks could be delivered, however uplifting."

Judge Ruth Ginsburg dissented from the court's standing decision, although she agreed that petitioner's claim had been properly dismissed by the district court (Pet. App. 26a-39a). In her view, petitioner satisfied the requirements of Article III insofar as he alleged that the " 'government must be blind to classifications based on theistic belief' " (Pet. App. 38a (citation omitted)). But like the district court, Judge Ginsburg concluded that petitioner's claims were foreclosed on the merits by *Marsh*. Rejecting petitioner's contention that *Marsh* applies only to Establishment Clause challenges, Judge Ginsburg explained (*id.* at 29a) that under *Marsh* "the existing legislative prayer practice * * * fits into a special nook—a narrow space tightly sealed off from otherwise applicable first amendment doctrine." Judge Ginsburg noted that petitioner had "misdescribed what the rules of Congress authorize," in that "[n]either the House nor the Senate authorizes its chaplain to conduct 'opening ceremonies' or 'speaker programs' " (*id.* at 28a). Accordingly, she stated (*id.* at 29a), petitioner's claim "is inevitably an attack on Congress' customary, opening-with-prayer observance." That claim, Judge Ginsburg concluded, is implicitly rejected by *Marsh*. "Because of the 'unique' historical roots of prayer to open the legislature's day, * * * and the status of prayer in that context, unadorned by surrounding ceremony, as 'part of the fabric of our society,' * * * [petitioner] has, under current jurisprudence, no tenable

free speech, establishment clause, or due process claim to advance" (*id.* at 30a (citation and footnote omitted)).

ARGUMENT

Petitioner asks this Court to review the judgment of the court of appeals holding that petitioner lacked standing to challenge his exclusion from the guest chaplain program in Congress. We are uncertain as to the validity of the court of appeals' reasoning on that issue. However, no further review of the case is warranted because, as Judge Ginsburg demonstrated (Pet. App. 26a-39a), petitioner's substantive claims are wholly without merit.

1. Since colonial times, national and state legislatures have invited clergymen to offer an invocation or prayer in connection with the performance of the legislature's business. The First Congress, for example, "provided for the appointment of two chaplains of different denominations who would alternate between the two Chambers on a weekly basis." *Marsh* v. *Chambers*, 463 U.S. 783, 793 n.13 (1983). Throughout most of our history, both Houses of Congress have had a designated Chaplain, with his or her services supplemented in a limited way by visiting or guest chaplains.

Current Senate Rules contain two references to the duties of the Chaplain. Rule IV, para. 1(a) refers to the approval of the Journal, "following the prayer by the Chaplain." Paragraph 2 of the same rule provides: "During a session of the Senate when that body is in continuous session, the Presiding Officer shall temporarily suspend the business of the Senate at noon each day for the purpose of having the customary daily prayer by the Chaplain." See *Standing Rules of the Senate and Congressional Budget and Impoundment Control Act of 1974, as amended*, S. Doc. 100-4, 100th Cong., 1st Sess. 3-4 (1987).

The rules of the House of Representatives contain three references to the Chaplain. Rule II states that "[t]here shall be elected by a viva voce vote, at the commencement of each Congress, to continue in office until their successors are chosen and qualified, a Clerk, Sergeant-at-Arms, Doorkeeper, Postmaster, and Chaplain." Rule VII, entitled "Duties of the Chaplain," provides that "[t]he Chaplain shall attend at the commencement of each day's sitting of the House and open the same with prayer." Finally, Rule XXIV, para. 1, provides that "[t]he daily order of business shall be as follows: First. Prayer by the Chaplain." See W. Brown, *Constitution—Jefferson's Manual and Rules of the House of Representatives,* H.R. Doc. 99-279, 99th Cong., 2d Sess. 323-333, 627 (1987).

2. In Count One of his complaint—the part whose dismissal he appealed to the court of appeals—petitioner alleged that his exclusion from the guest chaplain program violates the Establishment Clause and free speech component of the First Amendment, and the equal protection component of the Due Process clause of the Fifth Amendment (Pet. 5). In essence, petitioner asserted that "by opening their podiums to other chaplains who desire to give opening remarks to Congress, each Chaplain has created a limited public forum or a nonpublic forum for opening remarks" and that petitioner "has discriminatorily been denied access to express his viewpoint" (Pet. App. 47a).

As the district court held, however, and as Judge Ginsburg agreed, that claim is foreclosed by this Court's decision in *Marsh*. There, the Court upheld against an Establishment Clause challenge the practice of the Nebraska Legislature of opening each legislative day with a prayer by a chaplain paid by the State.[4] The Court noted

[4] Like the Congress, moreover, the Nebraska Legislature permitted guest chaplains to officiate at the request of various legislators (463 U.S. at 793).

(463 U.S. at 786) that "[t]he opening of sessions of legislative and other deliberative bodies with prayer is deeply embedded in the history and tradition of this country." Indeed, the Court explained (*id.* at 788 (footnote omitted)), "the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." As the Court concluded (*id.* at 790), "[i]t can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable."

The *Marsh* case, Judge Ginsburg correctly observed, "expressly or by clear implication" (Pet. App. 35a) forecloses petitioner's claims. Just as it is unreasonable to suppose that the Framers of the First Amendment viewed the Establishment Clause as a bar to prayer in the Legislature, so too is it untenable to contend, as petitioner does, that the Framers intended the establishment or free speech component of the First Amendment as "equal time" provisions, mandating "non-theistic" speech-making whenever Congress permits religious invocations. To the contrary, as Judge Ginsburg explained (*id.* at 29a), "the existing legislative prayer practice, *Marsh* plainly indicates, fits into a special nook—a narrow space tightly sealed off from otherwise applicable first amendment doctrine."

2. More generally, petitioner's claim ignores the fact that "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service* v. *Council of*

Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981). " 'The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.' " *Greer* v. *Spock*, 424 U.S. 828, 836 (1976) (citation omitted). In particular, "[t]he Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." *Minnesota State Bd. for Community Colleges* v. *Knight*, 465 U.S. 271, 283 (1984). As this Court explained in *Minnesota State Bd.*, "[p]olicymaking organs in our system of government have never operated under a constitutional constraint requiring them to afford every interested member of the public an opportunity to present testimony before any policy is adopted" (*id.* at 284). This limitation on the right to address the legislature personally stems both from "separation-of-powers concerns" (*id.* at 285), as well as from the practical recognition that some "petitions for redress of grievances" may not always be "consistent with other necessary purposes of public property." *Adderley* v. *Florida*, 385 U.S. 39, 54 (1966) (Douglas, J., dissenting). Thus, as Justice Douglas, dissenting in the *Adderley* case, noted, "[n]o one, for example, would suggest that the Senate gallery is the proper place for a vociferous protest rally" (*ibid.*).

Finally, the fact that the House and Senate Chaplains have invited other persons to serve as guest chaplains does not change the analysis. No person can claim a constitutional right to address Congress without its permission, and nothing in the record suggests that any such "public forum" right has been created by extending invitations to guest chaplains. See *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983); *Greer* v. *Spock*, 424 U.S. at 838 n.10. To the contrary, as the district court found (Pet. App. 54a), "the permission of the appropriate Chaplain is required for an individual to appear as a guest

chaplain either before the House or the Senate" and "the Chaplains have consistently exercised discretion in choosing guest chaplains, most obviously by imposing the requirement that they say a prayer." Thus, as the district court concluded (*ibid.*), the guest chaplain program is not a public forum and accordingly may make "distinctions in access on the basis of subject matter and speaker identity" that "are reasonable in light of the purpose which the forum * * * serves" (*Perry Educ. Ass'n*, 460 U.S. at 49 (footnote omitted)). Here, the Chaplains made just such a reasonable distinction, denying participation to a speaker who, for reasons of principle, could not fulfill the basic purpose of the chaplaincy: to offer a prayer.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1988

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